Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a collective action under the Fair Labor Standards Act be maintained when the employer's liability turns on a statutory exemption that must be litigated individually based on "all the facts in a particular case" (29 C.F.R. § 541.700(a))?

PARTIES TO THE PROCEEDINGS

Petitioner Family Dollar Stores, Inc. has no parent corporation. No publicly traded corporation owns 10 percent or more of Family Dollar's stock.

The four named Plaintiffs who are Respondents here are:

Janice Morgan
Barbara Richardson
Cora Cannon
Laurie Trout Wilson

A complete list of the 1,424 Respondents is included at App. 150a–72a.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	3
JURISDICTION	3
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	15
A. The Eleventh Circuit's decision conflicts with other courts' decisions that an FLSA collective action is incompatible with an individualized exemption defense.	16
B. The Eleventh Circuit's decertification ruling will stunt any further circuit-level development of the issue.	20

Contents

Page

C. Neither this Court nor the lower courts have established meaningful standards for certification of collective actions under the FLSA. 23

D. This is a recurring issue of national importance that affects both the procedure and the substance of FLSA litigation. 30

CONCLUSION 33

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed December 16, 2008 ..... 1a

Appendix B — Amended Final Judgment Of The United States District Court For The Northern District Of Alabama, Western Division Filed April 16, 2007 ..... 120a

Appendix C — Final Judgment Of The United States District Court For The Northern District Of Alabama, Western Division Filed March 31, 2006 ..... 122a

Appendix D — Memorandum Opinion On Motion To Decertify Of The United States District Court For The Northern District Of Alabama, Western Division Filed January 13, 2005 .... 124a

Appendix E — Memorandum Opinion Of The United States District Court For The Northern District Of Alabama, Western Division Filed November 7, 2002 ..... 132a

Appendix F — Pertinent FLSA Regulations ... 140a

Appendix G – List Of All Named And Opt-in Plaintiffs And Now Respondents 150a

Supplemental Appendix .....SA-1 – SA-82

TABLE OF CITED AUTHORITIES

Page

Cases

Aguirre v. SBC Communications,
2007 WL 772756 (S.D. Tex. Mar. 12, 2007) ... 17

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 29-30

Anderson v. Cagle's,
488 F.3d 945 (11th Cir. 2007) 22 n.4

Baldridge v. SBC Communications,
404 F.3d 930 (5th Cir. 2005) 20

Baldwin v. Trailer Inns,
266 F.3d 1104 (9th Cir. 2001) 32

Bayles v. Am. Med. Response,
950 F. Supp. 1053 (D. Colo. 1996) 17

Cameron-Grant v. Maxim Healthcare Servs.,
347 F.3d 1240 (11th Cir. 2003) 22 n.4

Castano v. American Tobacco,
84 F.3d 734 (5th Cir. 1996) 18 n.2

Comer v. Wal-Mart Stores,
454 F.3d 544 (6th Cir. 2006) 20

Cited Authorities

Page

Davis v. Family Dollar Stores,
No. 3:03-170-22BC (D.S.C. Sept. 28, 2004) ... 31

Donovan v. Burger King,
672 F.2d 221 (1st Cir. 1982) 32

Donovan v. Burger King,
675 F.2d 516 (2d Cir. 1982) 32

Fripp v. Family Dollar Stores,
No. 2:03-721-18BG (D.S.C. Sept. 27, 2004) ... 31

Grace v. Family Dollar Stores, Inc.,
2007 WL 2669699 (W.D.N.C. Sept. 6, 2007) . 18, 19

Grayson v. Kmart,
79 F.3d 1086 (11th Cir. 1996) 22 n.4

Hansberry v. Lee,
311 U.S. 32, 61 S. Ct. 115 (1940) 29

Haynes v. Singer Co.,
696 F.2d 884 (11th Cir. 1983) 22 n.4

Hipp v. Liberty Nat'l Life Ins.,
252 F.3d 1208 (11th Cir. 2001) 22 n.4

Hoffman-LaRoche v. Sperling,
493 U.S. 165 (1989) 23, 24

Cited Authorities

Page

Holt v. Rite Aid,
333 F. Supp. 2d 1265 (M.D. Ala. 2004) 28

In re Rhone-Poulenc Rorer,
51 F.3d 1293 (7th Cir. 1995) 18 n.2

Johnson v. Big Lots Stores,
561 F. Supp. 2d 567 (E.D. La. 2008) 17, 29, 31

Jones v. Virginia Oil,
69 Fed. Appx. 633 (4th Cir. 2003) 32

King v. West Corp.,
2006 WL 118577 (D. Neb. Jan. 13, 2006) 18

LaChapelle v. Owens-Ill.,
513 F.2d 286 (5th Cir. 1975) 22 n.4

Lusardi v. Lechner,
855 F.2d 1062 (3d Cir. 1988) 20, 25

Lusardi v. Xerox Corp.,
122 F.R.D. 463 (D.N.J. 1988) 18

Lusardi v. Xerox Corp.,
118 F.R.D. 351 (D.N.J. 1987) 18, 25

McElmurry v. U.S. Bank Nat'l Ass'n,
495 F.3d 1136 (9th Cir. 2007) 20

Cited Authorities

Page

Mike v. Safeco Ins. Co.,
274 F. Supp. 2d 216 (D. Conn. 2003) 17, 28

Mooney v. Aramco Servs.,
54 F.3d 1207 (5th Cir. 1995) 25

Morisky v. Pub. Serv. Elec. & Gas,
111 F. Supp. 2d 493 (D.N.J. 2000) 17, 18, 28

Murray v. Stuckey's,
50 F.3d 564 (8th Cir. 1995) 32

Murray v. Stuckey's,
939 F.2d 614 (8th Cir. 1991) 32

Ortiz v. Firbreboard Corp.,
527 U.S. 815 (1999) 29

Reich v. Homier Dist. Co.,
362 F. Supp. 2d 1009 (N.D. Ind. 2005) 17

Reyes v. Texas EZPawn,
2007 WL 101808 (S.D. Tex. 2007) 18

Shushan v. Univ. of Colo.,
132 F.R.D. 263 (D. Colo. 1990) 25 n.5

Smith v. Heartland Automotive Servs.,
404 F. Supp. 2d 1144 (D. Minn. 2005) 17, 18

Cited Authorities

Page

Thiessen v. GE Capital Corp.,
267 F.3d 1095 (10th Cir. 2001) 25

Thomas v. Speedway SuperAmerica,
506 F.3d 496 (6th Cir. 2007) 32

Ward v. Family Dollar Stores, Inc.,
2008 WL 199699 (W.D.N.C. Jan. 22, 2008) ... 18

Woods v. New York Life Ins.,
686 F.2d 578 (7th Cir. 1982) 24

Statutes

28 U.S.C. § 1254(1) 3

29 U.S.C. § 207 4

29 U.S.C. § 213 4

29 U.S.C. § 216(b) ..... *passim*

Page

Other Authorities

16 ALA. L. WEEKLY No. 6 (Feb. 9, 2007) 1

Administrative Office of the Federal Courts, *2007 Annual Report of the Director* 30

Miguel Bustillo, *Wal-Mart to Settle 63 Suits Over Wages*, WALL ST. J. (Dec. 24, 2008) 22

Fed. R. Civ. P. 23(b)(3) 7, 24

Fed. R. Civ. P. 23(f) 20

Stephen Franklin, *Workers Long for Overtime/ Employers See More Suits Alleging They Failed to Pay for Extra Hours*, HOUS. CHRON. 1, 2006 WLNR 12769557 (July 24, 2006) 21

Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues*, SM097 ALI-ABA 435 (2007) 21 n.3

Brent Hunsberger, *More Wage Cases Land in Court*, PORTLAND OREGONIAN D-1, 2003 WLNR 15802543 (Jan. 1, 2003) 21

Page

Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 THE LAB. LAWYER 311 (2005) 22

Kris Maher, *Workers Are Filing More Lawsuits Against Employers Over Wages*, WALL ST. J. A2 (June 5, 2006) 21 n.3

John P. McAdams & Michael A Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 No. 3 TRIAL ADVOC. Q. 16 (2006) 21 n.3

Mary Shedden, *Overtime Lawsuits A Budding Industry*, TAMPA TRIB. 1, 2007 WLNR 2421731 (Feb. 6, 2007) 21

Karen Sloan, *Class action workplace litigation hot item in '08*, NAT'L L.J. 12 (Jan. 19, 2009) 22

7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D (2005) 22-23, 24

Page

Regulations

29 C.F.R. § 541.1 (2003) 4, 26

29 C.F.R. § 541.100 (2006) 4, 26

29 C.F.R. § 541.102 (2003) 4, 9, 26

29 C.F.R. § 541.102 (2006) 4, 9, 26

29 C.F.R. § 541.103 (2003) 4, 16

29 C.F.R. § 541.105 (2006) 4

29 C.F.R. § 541.106 (2006) 2, 4, 16

29 C.F.R. § 541.700 (2006) ..... *passim*

69 Fed. Reg. 22,122 ..... 23, 30

PETITION FOR A WRIT OF CERTIORARI

The Fair Labor Standards Act sets minimum wages and maximum hours for workers employed in interstate commerce. The FLSA contains a statutory mechanism that allows one employee to sue collectively for all employees who are "similarly situated." 29 U.S.C. § 216(b). Since 1938, when Congress enacted the FLSA, this Court has never explained what "similarly situated" means or otherwise suggested what sorts of factors should govern certification of a collective action under the FLSA. As a result, certification and decertification of FLSA collective actions, particularly those involving overtime exemptions, has become increasingly unpredictable. Employers in turn have become afraid to litigate these actions to judgment. Rather than risk liability to thousands of employees based on the outcome of one collective jury trial, employers typically choose to settle—often for millions of dollars.

This case arises from one of the few FLSA collective actions to proceed through a jury trial to judgment. It involves 1,424 retail store managers who claim that Family Dollar Stores should have paid them an hourly wage plus overtime, rather than a salary. The case resulted in the largest jury verdict in Alabama in 2006. 16 ALA. L. WEEKLY No. 6, at 1 (Feb. 9, 2007). The judgment against Family Dollar exceeds $35 million. Family Dollar's petition asks the Court to decide whether this case was properly certified and maintained as a collective action under § 216(b). The specific question presented is whether an FLSA collective action can be certified where, as here, the employer's defense turns on an individualized exemption that, under the

governing FLSA regulations, must be "determined on a case-by-case basis" (29 C.F.R. 541.106(a)) based on the facts in each "particular case" (*id.* § 541.700(a)).

Most courts have held a collective action cannot be used when the employer's defense rests on an individualized exemption. But the Eleventh Circuit split from this view, holding that Family Dollar's exemption defense could be adjudicated collectively. Although the split here is between one circuit court and numerous district courts, this is a compelling case for certiorari. The Eleventh Circuit's decision sets a pro-employee precedent, making it the nationwide forum of choice for FLSA collective-action litigation. Those interested in bringing massive wage-and-hour cases will file suit in a district court within the Eleventh Circuit, rather than in one of the less hospitable district courts elsewhere. Accordingly, no traditional circuit split will develop. Instead, employees will simply file suit within the Eleventh Circuit on behalf of all supposedly "similarly situated" employees nationwide.

The Court should grant review to provide long-needed guidance to the lower courts on when FLSA collective actions should be certified or decertified. This procedural issue raises due process concerns whenever an employer like Family Dollar is held liable for millions of dollars in back wages to thousands of employees based upon the live testimony of only a handful of plaintiffs. The issue also has important practical ramifications on wage-and-hour litigation nationwide. Certiorari is warranted now.

Opinions Below

The Eleventh Circuit's opinion (App. 1a–119a) is published at 551 F.3d 1233. The District Court's collective action certification opinions (App. 124a–39a), judgment (App. 122a–23a), and amended judgment (App. 120a–21a) are unpublished.

Jurisdiction

The Eleventh Circuit entered its judgment on December 16, 2008. App. 1a. Justice Thomas granted Family Dollar an extension to file this petition until April 15, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

Section 216(b) of U.S. Code Title 29 provides in relevant part:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Section 207(a)(1) of U.S. Code Title 29 provides in relevant part:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 213(a) of U.S. Code Title 29 provides in relevant part:

> The provisions of sections 206 . . . and section 207 of this title shall not apply with respect to—
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity . . . .

Two sets of regulations apply to this case. *See* App. 70a. The regulations pertinent to the FLSA's executive exemption (29 C.F.R. §§ 541.1, .102, .103 (2003); 29 C.F.R. §§ 541.100, .102, .105, .106, .700 (2006)) are set out in the Appendix (App. 140a–49a).

STATEMENT OF THE CASE

1. Family Dollar is a small-box retailer with operations nationwide. App. 5a. Through its network of more than 6,000 stores, Family Dollar sells a variety of products, including basic groceries, clothing, hardware, household items, automotive supplies, general merchandise, and seasonal goods. *Id.* Each store is a profit center generally located in a strip mall or a stand-alone building. Doc. 251 ¶5. Consequently, the stores are unique in size and configuration, with sales floors as small as 3,700 square feet to as large as 12,300 square feet. *Id.* Individual store sales vary, from $210,000 to over $4 million annually. *Id.* ¶6.

A store generally is staffed with one salaried store manager, at least one hourly assistant manager, and two or more hourly sales associates. *Id.* ¶10; DX2324. The store manager is the highest ranking employee in a store. He or she is responsible for supervising the hourly employees, ensuring the store complies with Family Dollar standards, ordering weekly inventory, completing company paperwork, responding to emergencies, maintaining customer service, and making daily bank deposits. App. 24a–27a; Doc. 715 at 117–21. Family Dollar's sales transactions are predominantly in cash, so the store manager must protect large quantities of currency. Doc. 715 at 121. The store manager must also secure store inventory, which ranges from $100,000 to $390,000. Doc. 251 ¶6. In short, the store manager is the on-site executive responsible for the daily operation of what can be a substantial retail operation. App. 23a.

Since its founding in 1959, Family Dollar has always classified its store managers as exempt under the FLSA. Doc. 226 Ex.A ¶3. The store manager is the only exempt employee paid a salary at the store level. Doc. 251 ¶11. From 1999 to 2004, store manager salaries ranged from $400 to $1,100 weekly, or $20,800 to $57,200 annually. *Id.* Store managers are also the only store-level employees eligible for additional benefits such as sick pay and a bonus. Doc. 685 at 242–43. Bonuses are based on controllable store profits and range from hundreds to thousands of dollars. *Id.*; Doc. 251 ¶ 11.

The store manager reports to a district manager. A district manager has between 10 and 30 stores in a district. App. 23a–24a. Family Dollar has only 380 district managers for more than 6,000 stores. App. 23a. Some districts cover a single metropolitan area (as small as 20 square miles), while other districts span multiple states (up to 32,000 square miles) or have stores spread as far as 200 miles apart. App. 24a; Doc. 251 ¶8; Doc. 715 at 111. A district manager may visit a particular store once a week, once a month, or less frequently. App. 43a n.22; SA-66–82. The district manager's visit can last anywhere from 15 minutes to 2 hours. Doc. 683 at 171–72; Doc. 685 at 103. Otherwise, the district manager communicates with the store manager via phone and email. App. 43a.

Like other national retail chains, Family Dollar has adopted policies and procedures to make a shopper's experience consistent from store to store. App. 24a. For instance, Family Dollar designs "schematics" keyed to store size that determine where products should be placed on the shelves. App. 30a. The store manager is

responsible for ensuring that the store is set up according to the schematic and for updating the schematic according to company directives. App. 25a. Family Dollar has also instituted comprehensive human resources policies. App. 45a–48a. Due to the extensive federal and state regulation of employment, such policies are necessary to ensure adequate corporate oversight of significant decisions such as hiring, promotion, or firing. Doc. 685 at 204–14, 232–33.

2. Two store managers in Alabama sued Family Dollar under the FLSA, claiming they were improperly classified as exempt. App. 5a. The case was filed as a "collective action" under 29 U.S.C. § 216(b), which allows plaintiffs to sue on behalf of themselves and other "similarly situated" employees. App. 6a. In contrast to a class action under Federal Rule of Civil Procedure 23(b)(3), an FLSA collective action requires any employee who wants to become "a party plaintiff" to opt into the case by giving "consent in writing." § 216(b).

The district court conditionally certified the case as a collective action and notified over 12,000 current and former Family Dollar store managers nationwide. App. 10a–11a. Ultimately, 1,424 Plaintiffs opted into the case. App. 15a n.5.

The case proceeded through discovery. The District Court allowed Family Dollar to depose only 255 of the Plaintiffs. App. 13a–14a. The court allowed Plaintiffs' counsel to designate the majority of the Plaintiffs that were deposed. App. 13a.

3. Family Dollar moved to decertify the collective action. App. 15a. It argued that the District Court had to decertify the collective action because the Plaintiffs' managerial duties varied widely and because the executive exemption is inherently individualized. App. 15a–16a. In support, Family Dollar submitted the Plaintiffs' depositions (Doc. 230), along with charts summarizing numerous factual differences among the Plaintiffs (Doc. 255 Exs.1–3).

Under the governing regulations, the FLSA's executive exemption turns on a number of individual factors that Family Dollar used to show Plaintiffs' dissimilarity. Those regulations define "management" to include:

> Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the[] work [of employees]; maintaining [] production or sales records for use in supervision or control; appraising [employees'] productivity and efficiency for the purpose of recommending promotions or other changes in [] status; handling [employee] complaints and grievances[;] disciplining [employees]; planning the work; determining the techniques to be used; apportioning the work among the [employees]; determining the type of . . . merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the [employees] [or] the property.

29 C.F.R. § 541.102(b) (2003); *id.* § 541.102 (2006) (minor differences shown in brackets).

Family Dollar argued that the deposition testimony on these managerial duties showed that the Plaintiffs were not "similarly situated." App. 15a–16a. The Plaintiffs' testimony about their managerial duties varied significantly, depending on whether the store was small or large, was rural or urban, and had few or many employees. Charts of the deposition testimony revealed dissimilarity across all the relevant management criteria (SA-42–64) as well as the degree of oversight by district managers (SA-6–40). (These charts are included in a supplemental appendix provided with the petition.)

The depositions of two Plaintiffs illustrate these differences. *See* Doc. 250 at 25–26. Plaintiff Krista Allen was a Family Dollar store manager in a large urban store in Baltimore, Maryland. She testified that she exercised *all* of the relevant management functions of an exempt employee. *See* SA-42, line 3. She could hire, fire, and discipline employees; she made recommendations regarding hiring, firing, discipline, and promotion; she interviewed potential hires; she trained new employees; she set or adjusted the hours of work for store employees; she directed employee work; she maintained production and sales records; she appraised the productivity and efficiency of her employees; and she planned their work. *Id.*; SA-66, line 3. Allen testified that, when she was in the store, she was running the store and supervising employees all the time. Doc. 230 (K. Allen Dep.) at 59, 140.

Plaintiff Angela Turner was the manager of small rural stores in Chatham and Butler, Alabama. She testified, in sharp contrast to Krista Allen, that she exercised *none* of the relevant management functions of an exempt employee. *See* SA-60, line 229. She could not hire, fire, or discipline employees; she did not make recommendations regarding hiring, firing, discipline, or promotion; she did not interview potential hires; she did not train new employees; she did not set or adjust the hours of work for store employees; she did not direct employee work; she did not maintain production and sales records; nor did she appraise the productivity and efficiency of her employees. *Id.*; SA-81, line 229. According to Turner, only her district manager exercised managerial authority. Doc. 230 (A. Turner Dep.) at 75. She testified that, when she was in the store, she was not responsible for any other employee. *Id.* at 80–81.

Family Dollar argued that a Plaintiff like Turner, who answered "No" to every question concerning the managerial duties, could not adequately represent a Plaintiff like Allen, who answered "Yes" to the same questions. Family Dollar argued that the disparate testimony of all 255 deponents demonstrated that no one Plaintiff's testimony was truly representative of any other's. Doc. 250 at 26. Plaintiffs own expert agreed that each store manager must be examined "individually to see if the exemption applies." Doc. 230 (Belt Dep.) at 221–22. A section taken from the middle of Family Dollar's deposition chart shows the dissimilarity.[1]

[1] The entire chart can be found at SA-42–64. The deposition page references used to create the chart follow, at SA-66–82.

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
125	LaBonte, James	Y		Y		Y	Y	Y	Y	Y	Y	Y		Y	Y
126	Land, Terry	N	N	N	Y	Y	Y			N	N	N			
127	Lane, Lori		N	N	N	N	N	N	Y	Y	Y	N	Y	N	N
128	Lee, Alvin	N	N	Y	Y	Y	Y		Y	Y	Y	Y		N	Y
129	Leflore, Patricia D.				Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y
130	Lumley, Mark				Y	Y	Y		Y	Y		Y	Y	Y	
131	Maclane, James	Y				Y	Y	Y	Y	N	Y	N	Y		N
132	Majeski, David	N	N	N	N	N	N		N	N	N	N	Y		

4. The District Court nonetheless denied Family Dollar's decertification motion. App. 131a. The court did not address Family Dollar's argument that its individualized exemption defense is incompatible with a collective action. App. 130a. The court also rejected Family Dollar's procedural and constitutional challenges to a collective jury trial. App. 130a–31a. The court stated that "plaintiffs may rely on representative testimony to establish liability and obtain relief," and concluded that "notions of due process and fairness are not offended by a collective trial." *Id.*

Consistent with its opinion allowing the case to proceed as a collective action, the District Court let the Plaintiffs to try their case using representative evidence from witnesses chosen by Plaintiffs' counsel. Doc. 384 ¶9(b); Doc. 533. The court directed the Plaintiffs to anticipate Family Dollar's exemption defense in their case in chief (Doc. 533 ¶2) and limited each side's case to 40 hours of trial time (Doc. 386 Attach.1).

5. The case proceeded to a collective jury trial. App. 21a. In the first trial, the jury deadlocked on the executive exemption. *Id.* During the second trial, the Plaintiffs offered "representative" testimony from a few Plaintiffs handpicked by Plaintiffs' counsel on behalf of all 1,424 Plaintiffs. Only 7 Plaintiffs—all from small, rural stores—testified live in the Plaintiffs' case.

At trial, Family Dollar moved to decertify the collective action and proceed only on the claims of those Plaintiffs who testified. Doc. 559. The district court denied the motion. Doc. 579. The court instructed the jury that not all 1,424 Plaintiffs needed to testify because they were relying on "representative testimony." Doc. 719 at 9. That is, the court instructed the jury to decide Family Dollar's liability to the non-testifying Plaintiffs on an all-or-nothing basis. *Id.* at 9–10.

The jury found that Plaintiffs were not exempt under the FLSA. App. 51a. The district court entered judgment on the jury's verdict and awarded liquidated (or double) damages. App. 122a–23a. After making adjustments for certain Plaintiffs who had filed for bankruptcy, the court entered judgment against Family Dollar for nearly $35.6 million. App. 121a. The final

judgment includes approximately $17 million in overtime backpay and an equal amount of liquidated damages. *Id.*

6. The Eleventh Circuit affirmed the judgment in full. App. 119a. As relevant here, the court affirmed the district court's refusal to decertify the collective action. App. 61a, 69a. The court acknowledged that it had not adopted a precise definition of "similarly situated" under § 216(b), relying instead on an *ad hoc* approach to certification of a collective action. App. 55a–57a & n.38, 59a.

The Eleventh Circuit set out the three factors it considers at the decertification stage: (1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant that are individual to each plaintiff, and (3) fairness and procedural considerations. App 60a. The court then rejected Family Dollar's argument on each factor. App. 61a–69a.

The Eleventh Circuit first addressed Family Dollar's argument that the Plaintiffs' job duties varied widely from store to store. The court rejected Family Dollar's argument based on the company's own decision to classify all its store managers as exempt. App. 63a. The court held that because Family Dollar had "exempted all store managers from overtime pay requirements without regard to store size, sales volume, regions, district, or hiring and firing authority," any evidentiary distinctions among the Plaintiffs were immaterial. App. 63a–64a. In other words, the court used a business decision first made in the 1950s to reject Family Dollar's legal arguments made in the 21st Century.

For the same reason, the Eleventh Circuit rejected Family Dollar's argument that its individualized defenses precluded a collective action. Because "Family Dollar applied the executive exemption across-the-board to every store manager," the court concluded the company could not show the district court erred in "finding that its defenses were not so individually tailored to each Plaintiff as to make this collective action unwarranted or unmanageable." App. 64a–65a. The court failed to acknowledge that the District Court's decision did not mention, much less discuss, the exemption defense as one of Family Dollar's individualized defenses. *See* App. 130a.

On the third factor—fairness and procedural considerations—the Eleventh Circuit rejected Family Dollar's argument that "any collective action would be inherently unfair" given "the size of the class, the individualized application of the exemption defense, and the [District Court's] decision to allow representative testimony at trial." App. 66a. The court acknowledged Family Dollar's argument that "the store's size, sales volume, and location cause store managers' job duties to vary and preclude a collective trial," but concluded that "none of those factors had anything to do with Family Dollar's decision to exempt all store managers from overtime pay." App. 67a n.46

Reasons for Granting the Petition

The Eleventh Circuit's decision warrants this Court's review. The FLSA's executive exemption is both fact-specific and case-specific: It depends on "all the facts in a *particular* case." 29 C.F.R. § 541.700(a) (2006) (emphasis added). The Plaintiffs here include more than 1,400 individuals employed across 40 states, in large stores and small, in rural and urban areas, supervising workforces of varying sizes. Deposition testimony of 255 Plaintiffs showed substantial variations in the job duties that define management under the executive exemption, including the authority to hire, fire, train, interview, appraise, and set work schedules for subordinates. SA-42–64. The Eleventh Circuit nevertheless affirmed the District Court's holding that *each* of the Plaintiffs—more than 99 percent of whom did not even testify at trial—was "similarly situated" to every other Plaintiff. App. 62a.

The Eleventh Circuit's decision in this case conflicts with decisions of numerous other courts holding that litigation over an individualized FLSA exemption is incompatible with the collective-action device. These courts recognize that collective actions should not be certified where individualized inquiries are necessary to resolve application of an FLSA exemption.

If left uncorrected, the Eleventh Circuit's decision could become the *de facto* national rule. Rather than risk filing a collective action in a circuit less hospitable to such claims, employees will now race to file suit in Alabama, Florida, or Georgia on behalf of all employees nationwide. Further percolation will not solve the

problem or result in some better vehicle down the road. Now that the Eleventh Circuit has opened itself up to FLSA collective litigation, there will be little to no further development of the law elsewhere. This Court should step in now to provide the lower courts guidance on the procedural standards necessary to assure that FLSA collective actions are litigated fairly and constitutionally.

A. The Eleventh Circuit's decision conflicts with other courts' decisions that an FLSA collective action is incompatible with an individualized exemption defense.

The FLSA's executive exemption is inherently individualized. The regulations explain that the applicability of this exemption must be decided individually, plaintiff by plaintiff: "Determination of an employee's primary duty must be based on *all the facts in a particular case*." 29 C.F.R. § 541.700(a) (2006) (emphasis added). *See also id.* § 541.103 (2003) ("A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case."). Especially where, as here, a manager performs exempt and nonexempt duties concurrently, the exempt status of that employee must be "determined on a case-by-case basis." *Id.* § 541.106(a) (2006).

Notwithstanding the individualized nature of the exemption defense, the Eleventh Circuit held that 1,424 exemption claims could be litigated collectively in one jury trial. According to the court, "Just because the inquiry is fact-intensive does not preclude a collective

action where plaintiffs share common job traits." App. 64a. The court also concluded that collective action treatment was justified because "Family Dollar applied the executive exemption across-the-board to every store manager." *Id.*

By contrast, other courts hold that claims over an individualized FLSA exemption cannot be maintained in one collective action. These courts hold that the fact-intensive, individualized nature of the exemption analysis fatally undermines the claim that the plaintiffs are "similarly situated." *See Aguirre v. SBC Communications*, 2007 WL 772756, at *14 (S.D. Tex. Mar. 12, 2007) ("In cases with similar variability among the members of the putative class of allegedly misclassified employees, courts have refused to certify the case for collective treatment because an individual inquiry into each plaintiff's job duties is required.") (collecting cases). *Accord Johnson v. Big Lots Stores*, 561 F. Supp. 2d 567, 586–87 (E.D. La. 2008); *Smith v. Heartland Automotive Servs.*, 404 F. Supp. 2d 1144, 1151–54 (D. Minn. 2005); *Reich v. Homier Dist. Co.*, 362 F. Supp. 2d 1009, 1013–14 (N.D. Ind. 2005); *Mike v. Safeco Ins. Co.*, 274 F. Supp. 2d 216, 220–21 (D. Conn. 2003); *Morisky v. Pub. Serv. Elec. & Gas*, 111 F. Supp. 2d 493, 498–99 (D.N.J. 2000). *Cf. Bayles v. Am. Med. Response*, 950 F. Supp. 1053, 1065 (D. Colo. 1996) ("It is oxymoronic to use a [collective action] where proof regarding each individual plaintiff is required to show liability.").

In addition, courts have recognized that a collective action over an individualized exemption is neither manageable nor superior to litigating the claims

individually. *See Reyes v. Texas EZPawn*, 2007 WL 101808, at *5–*7 (S.D. Tex. Jan. 8, 2007); *Smith*, 404 F. Supp. 2d at 1154–55; *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 466–67 (D.N.J. 1988); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 370–71 (D.N.J. 1987), *mandamus granted on other grounds*, 855 F.2d 1062 (3d Cir. 1988). As the court in *Morisky* observed, litigating an individualized exemption collectively is not efficient because the "exempt or non-exempt status of potentially hundreds of employees would need to be determined on . . . an employee-by-employee basis." 111 F. Supp. 2d at 499, *followed in King v. West Corp.*, 2006 WL 118577, at *14 (D. Neb. Jan. 13, 2006).[2]

Such inconsistency over collective action procedure is untenable. Family Dollar itself has suffered inconsistent results on this very question in two other collective actions. *See Grace v. Family Dollar Stores, Inc.*, 2007 WL 2669699 (W.D.N.C. Sept. 6, 2007), and *Ward v. Family Dollar Stores, Inc.*, 2008 WL 199699 (W.D.N.C. Jan. 22, 2008). The district court in *Grace* and *Ward* refused to certify collective actions covering the identical claims of other store managers. The court held, "A collective action is never appropriate for situations where a court must make an individual determination of each plaintiff's day-to-day activities." *Grace*, 2007 WL 2669699, at *3. "Since each individual manager had

[2] Collective-action treatment is not necessary to assure that wage-and-hour claims are litigated. The FLSA's additional remedies of fee-shifting and liquidated damages (*see* 29 U.S.C. § 216(b)) give each plaintiff incentives to pursue his or her claim individually. *Cf. Castano v. American Tobacco*, 84 F.3d 734, 748 (5th Cir. 1996); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1300 (7th Cir. 1995).

different duties at his or her particular [Family Dollar] store," the court found it "impossible to apply one plaintiff's duties to another." *Id.* The court thus concluded that determining "whether or not the plaintiffs are similarly situated would require a[] fact-specific inquiry into the daily duties of each plaintiff," which "defeats the point of a collective action." *Id.*

This case provides an excellent vehicle for this Court to resolve the disagreement in the lower courts. The deposition testimony taken during discovery revealed the wide disparity among the Plaintiffs both on their managerial job duties and their level of oversight by district managers. See SA-1–88. Had this case arisen in any of the courts that disagree with the Eleventh Circuit's approach, Family Dollar's individualized exemption defense would have resulted in decertification of the collective action. Yet in the Eleventh Circuit, Family Dollar's decision to classify all its store managers as exempt foreordained certification of a collective action by those employees who shared common job traits.

The Court should not tolerate such inconsistent outcomes on such an important procedural issue. The Court should grant certiorari to resolve this conflict.

B. The Eleventh Circuit's decertification ruling will stunt any further circuit-level development of the issue.

The Court should address the issue now. Although the cases on the other side of the split have been decided by district courts, that does not counsel against review here. The courts of appeals have uniformly held that § 216(b) certification and decertification decisions are not appealable on an interlocutory basis. *E.g.*, *McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1141 (9th Cir. 2007) ("[C]ourts have uniformly held that they lacked jurisdiction over the appeal, both where the district court has certified and decertified the collective action"); *Comer v. Wal-Mart Stores*, 454 F.3d 544, 548–49 (6th Cir. 2006); *Baldridge v. SBC Communications*, 404 F.3d 930, 931–33 (5th Cir. 2005); *Lusardi v. Lechner*, 855 F.2d 1062, 1065 (3d Cir. 1988). Also, there is no permissive appeal under § 216(b) analogous to that for class actions under Rule 23(f).

Although § 216(b) certification decisions are reviewable on final judgment, neither plaintiffs nor defendants typically press such appeals. If the court denies certification or decertifies a § 216(b) collective action, other plaintiffs can simply file their FLSA claims somewhere else. On the other hand, when the court refuses to decertify a collective action, leaving nothing left to do but try the case collectively before one jury, defendants usually settle. Regardless of how the issue is decided, it rarely results in full review at the circuit level.

Declining to review the Eleventh Circuit's decision in this case will only make a bad situation worse. Legal experts have called FLSA collective actions "the nation's fastest growing legal battlefront between workers and companies." Stephen Franklin, *Workers Long for Overtime/Employers See More Suits Alleging They Failed to Pay for Extra Hours*, HOUS. CHRON. 1, 2006 WLNR 12769557 (July 24, 2006).[3] In 2003, Department of Labor statistics revealed that the number of FLSA collective action filed annually surpassed the number of other employment class actions filed. Brent Hunsberger, *More Wage Cases Land in Court*, PORTLAND OREGONIAN D-1, 2003 WLNR 15802543 (Jan. 1, 2003). As this case demonstrates, a collective action against a nationwide chain can just as easily be filed in Alabama, Florida, or Georgia under § 216(b) on behalf of all managers nationwide.

Left uncorrected, the Eleventh Circuit's decision could likely become the national rule. The Eleventh Circuit is already a hotbed for FLSA collective actions. *See* Mary Shedden, *Overtime Lawsuits A Budding Industry*, TAMPA TRIB. 1, 2007 WLNR 2421731 (Feb. 6, 2007) (dubbing South and Central Florida the "capitals

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[3] *See also* Kris Maher, *Workers Are Filing More Lawsuits Against Employers Over Wages*, WALL ST. J. A2 (June 5, 2006); Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues*, SM097 ALI-ABA 435, 455 (2007) (noting "proliferation of employee collective action lawsuits"); John P. McAdams & Michael A Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 No. 3 TRIAL ADVOC. Q. 16, 20 (2006) ("Collective actions under the FLSA are one of the fastest-growing areas of litigation of any kind").

of this emerging industry").[4] If the Eleventh Circuit's decision stands, it will become their greenhouse.

The Court should also consider the *in terrorem* effect of FLSA collective actions. The possibility of enormous liability awards, based on a complex law that is often difficult to apply, creates enormous pressure for employers to settle. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 THE LAB. LAWYER 311, 315 (2005). In 2007, the top wage-and-hour collective or class action settlements exceeded $319 million; in 2008, $252 million. Karen Sloan, *Class action workplace litigation hot item in '08*, NAT'L L.J. 12 (Jan. 19, 2009). Those figures do not include Wal-Mart's decision at the end of last year to settle 63 wage-and-hour cases for up to $640 million. Miguel Bustillo, *Wal-Mart to Settle 63 Suits Over Wages*, WALL ST. J. (Dec. 24, 2008).

Continuing uncertainty over how the executive exemption applies to retail store managers forces employers to settle rather than risk their business model on litigation of one collective action on behalf of thousands of employees before one jury. *See* 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL

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[4] This may explain why practically all the circuit-level decisions on § 216(b) have been decided by the Eleventh Circuit. *See Anderson v. Cagle's*, 488 F.3d 945 (11th Cir. 2007); *Cameron-Grant v. Maxim Healthcare Servs.*, 347 F.3d 1240 (11th Cir. 2003); *Hipp v. Liberty Nat'l Life Ins.*, 252 F.3d 1208 (11th Cir. 2001); *Grayson v. Kmart*, 79 F.3d 1086 (11th Cir. 1996); *Haynes v. Singer Co.*, 696 F.2d 884 (11th Cir. 1983); *LaChapelle v. Owens-Ill.*, 513 F.2d 286 (5th Cir. 1975).

3D § 1807, at 503 (2005) (observing "most collective actions settle"). The Department of Labor has recognized that large-scale collective actions take advantage of such legal uncertainty, imposing a "significant cost to the economy." 69 Fed. Reg. 22,122, 22,231.

Employee wages should depend on what the law requires, not confusion over the outcome of high-stakes litigation. Further percolation of this issue will result in little to no further development outside the Eleventh Circuit. The importance of this statutory question to retailers across the country and its economic scope justify the Court's review of the issue in this case.

C. Neither this Court nor the lower courts have established meaningful standards for certification of collective actions under the FLSA.

Congress enacted the FLSA in 1938 as a centerpiece of the New Deal. 52 Stat. 1069 (June 25, 1938). The FLSA's collective-action mechanism allows one employee to sue on behalf of other employees who are "similarly situated." 29 U.S.C. § 216(b). This procedure creates "a unique species of group litigation." 7B WRIGHT, MILLER & KANE, § 1807, at 468. Although the FLSA originally allowed an uninterested representative to sue on behalf of others, Congress removed that provision in the Portal-to-Portal Act of 1947 and instead required interested plaintiffs to affirmatively opt into the litigation. 61 Stat. 84, 87–88. *See* S. Rep. No. 48, at 49 (1947); *Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 173 (1989).

Unlike Rule 23, there are no representative plaintiffs in an FLSA collective action. Instead, an interested employee who wants to become a "party plaintiff" must opt in to the litigation by giving "consent in writing" that is "filed in the court." 29 U.S.C. § 216(b). Each plaintiff "has the right to be present in court to advance his or her own claim." 7B WRIGHT, MILLER & KANE § 1807, at 475. Also, the *res judicata* effect of the judgment in an FLSA collective action is more limited. A § 216(b) collective member "must opt in to be bound," while a Rule 23(b)(3) class member "must opt out not to be bound." *Woods v. New York Life Ins.*, 686 F.2d 578, 580 (7th Cir. 1982).

The FLSA does not define "similarly situated," nor does it spell out the procedure for certifying a § 216(b) collective action. This Court hasn't done so, either. The Court's only decision addressing § 216(b) is *Hoffman-La Roche v. Sperling*, which authorized district courts to facilitate notice to potential opt-in plaintiffs. 493 U.S. at 169. In *Hoffman-La Roche*, the Court recognized that FLSA collective actions present "opportunities for abuse" and discussed the federal courts' "duty and broad authority to exercise control" over such actions. *Id.* at 171 (internal quotation omitted). Having authorized federal courts to "midwif[e]" these actions (*id.* at 176 (Scalia, J., dissenting)), the Court has not taken the next step to decide what procedural standards should govern certification or decertification of § 216(b) collective actions.

Without any appellate guidance, the leading approach to certifying collective actions is an *ad hoc*

analysis developed by district courts.[5] *See Lusardi*, 118 F.R.D. at 358–59. The most remarkable feature of the *ad hoc* approach is its failure to define "similarly situated," the statutory basis for the procedure. *See Mooney v. Aramco Servs.*, 54 F.3d 1207, 1213 (5th Cir. 1995) (discussing *Lusardi* and its progeny), *overruled on other grounds by Desert Palace v. Costa*, 539 U.S. 90 (2003). All of the circuits to address the issue—including the Eleventh Circuit here—have either avoided the definitional issue or adopted the *ad hoc* approach. *See Mooney*, 54 F.3d at 1216 (avoiding decision); App. 55a–56a & n.38 (adopting *ad hoc* approach); *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1102–05 (10th Cir. 2001) (discussing possible approaches and adopting *ad hoc*). As a result, the FLSA's powerful statutory mechanism allowing for nationwide collective actions is limited only by a particular judge's interpretation of the term "similarly situated." This

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[5] The minority approach, which applies the standards of Rule 23 to FLSA collective actions, was first developed in *Shushan v. Univ. of Colo.*, 132 F.R.D. 263 (D. Colo. 1990). The court in *Shushan* concluded that without Rule 23, § 216(b) procedures would be "practically formless":

> [I]t does not seem sensible to reason that, because Congress has effectively directed the courts to alter their usual course and not be guided by rule 23's 'opt-out' feature in a [§ 216(b)] class action, it has also directed them to discard the compass of rule 23 entirely and navigate the murky waters of such action by the stars or whatever other instruments they may fashion.

Id. at 266.

Court's clarification of this important procedural area is long overdue.

This case illustrates the problems caused by a failure to define "similarly situated" in the context of an FLSA collective action. This case is about whether each Family Dollar store managers is an exempt executive employee. The primary factual question under the exemption is whether the Plaintiffs' primary duty is "management." 29 C.F.R. § 541.100(a)(2) (2006); 29 C.F.R. § 541.1(a) (2003). Family Dollar conducted discovery to determine whether the Plaintiffs exercised the job duties that the FLSA regulations use to define "management." *See* 29 C.F.R. § 541.102 (2006); 29 C.F.R. § 541.102(a) (2003). It found significant dissimilarity among the Plaintiffs on those job duties.

Tabulating the managerial duties of just the 255 Plaintiffs whom Family Dollar was allowed to depose revealed widespread dissimilarity. On the authority to hire employees, for example, 54 percent of those Plaintiffs testified that they had such authority, while 46 percent testified that they did not. SA-64. When asked whether they had authority to fire employees, 33 percent said yes, and 67 percent said no. *Id.* When asked whether they had authority to discipline, 73 percent said yes, and 27 percent said no. *Id.* Similarly, 71 percent said they had responsibility for appraising or reviewing their employees' job performance, and 29 percent said they did not. *Id.* More than three-quarters of the deposed Plaintiffs admitted that they planned the work of their employees. When asked this question in their depositions, 78 percent answered yes,

while 22 percent answered no. *Id.* Such disparate testimony showed that the Plaintiffs were not similarly situated.[6]

Without a defined standard to govern how "similarly situated" employees must be, however, the Plaintiffs were able to circumvent Family Dollar's proof of dissimilarity by arguing similarity of a different—and altogether irrelevant—kind. Nothing in the FLSA or its regulations requires that an exempt manager must exercise "sole" or "independent" authority to hire, fire, discipline, or promote employees without any oversight. Nonetheless, the Plaintiffs used such a standard to paper over the differences shown by Family Dollar's chart with a chart showing that no deponent exercised such "sole authority." Doc. 295 Exs.B & P; Doc. 296 Porter Aff.; Doc. 298 at 2–3 & n.1. The District Court adopted this rationale and found the Plaintiffs similarly situated because they all "lack *independent authority* to hire, promote, discipline, or terminate *assistant managers*." App. 128a (citing Pls.' Exs.B & P) (emphasis added). Applying that standard is like finding

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[6] The Eleventh Circuit disregarded the deposition testimony on the ground that Family Dollar's chart "fail[s] to paint a full picture." App. 65a n.44. The court quibbled with whether certain boxes on the chart were appropriately checked based on one Plaintiff's deposition, but it did not find that the evidence was inaccurate. *Id.* Nor did it dispute that different Plaintiffs gave varying deposition testimony on the range of duties used to define "management." *Id.* The charts themselves refute the court's comment that they failed to address "aspects of store manager's day-to-day duties" other than the authority "to hire, fire, interview, train, and discipline other employees" (*id.*). *See* SA-42–64.

all Plaintiffs similarly situated because none of them has flown to the moon. While that may be true, it is legally irrelevant to what the FLSA and its regulations require.

The Eleventh Circuit did not apply a more meaningful standard of similarity. As it has in past decisions, the Eleventh Circuit refused to adopt a precise definition of what "similarly situated" means under § 216(b). App. 55a–56a & n.38, 59a. Instead, the court agreed with the Plaintiffs' argument that none of the factual differences among the Plaintiffs mattered because Family Dollar had decided to classify its store managers as exempt across the board. App. 63a, 64a, 66a, 67a n.46.

The court did not explain how a business decision made decades ago—classifying a job as exempt—could overcome current evidentiary dissimilarity among the Plaintiffs on that exemption or the individualized analysis necessary to apply the exemption or the unfairness of litigating 1,424 individualized claims before one jury. As a practical matter, businesses do not make exemption classification decisions employee by employee. But if an individual employee challenges his or her classification, the FLSA requires that decision to be made plaintiff by plaintiff, based on all the facts in a "particular case." 29 C.F.R. § 541.700(a) (2006). Just because Family Dollar classified its store managers as exempt for purposes of its business model does not mean that all of the employees who hold that job are "similarly situated" for purposes of collective-action litigation. *See Holt v. Rite Aid*, 333 F. Supp. 2d 1265, 1270–72 (M.D. Ala. 2004); *Mike*, 274 F. Supp. 2d at 220–21; *Morisky*, 111 F. Supp.

2d at 498–99. Yet the Eleventh Circuit relied on that business decision both to find the Plaintiffs similarly situated and to reject Family Dollar's procedural objections.

When application of the term "similarly situated" is this lax, it risks violating due process. Forcing Family Dollar to litigate its liability for overtime to 1,424 different employees in a collective trial before one jury raises "serious questions . . . concerning the fairness, manageability, and meaningfulness" of a collective action. *Lusardi*, 118 F.R.D. at 370–71. *See also Johnson*, 561 F. Supp. 2d at 587 ("observing "efficiency gains" from a collective action "cannot come at the expense of a defendant's ability to prove a statutory defense without raising serious concerns about due process"). The procedure used here left Family Dollar's liability to be determined all or nothing based on a handful of witnesses whose testimony was not representative of the whole. If due process would not allow such a judgment to stand in a class action (*Hansberry v. Lee*, 311 U.S. 32, 41–45 (1940)), it should not apply any differently to a § 216(b) collective action.

This Court should consider these due process ramifications in deciding the proper operation of § 216(b)'s collective-action procedure. Section 216(b) has been in place for over 70 years, and employees are invoking more often—and more powerfully—now than ever before. Guidance from this Court on the procedural standards for certifying § 216(b) collective actions is overdue. In the class-action context, this Court's recent decisions have dramatically clarified how Rule 23(b) class actions operate. *See Ortiz v. Firbreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*,

521 U.S. 591 (1997). The Court should intervene to provide similar guidance concerning the procedural standards that should govern § 216(b) class actions.

D. This is a recurring issue of national importance that affects both the procedure and the substance of FLSA litigation.

This case also raises a recurring issue of national importance. According to the Department of Labor, the FLSA's overtime provisions cover approximately 114 million workers. 69 Fed. Reg. 22,122, 22,197 & Chart 1. The wages of more than 64 million employees are affected by the FLSA's executive, administrative, and professional exemptions. *Id.* at 22,201 & Chart 3. More than 20 million employees work in the retail industry alone. *Id.* at 22,220 & Table 5.1. Employees file thousands of lawsuits under the FLSA each year, a number that is growing exponentially. Federal court statistics show the number of FLSA actions filed annually has nearly quadrupled since 2003. Administrative Office of the Federal Courts, *2007 Annual Report of the Director* 150 (Table C-2A) (2,751 cases in 2003; 7,310 cases in 2007). Between 2006 and 2007 alone, annual FLSA case filings saw a 73.8 percent increase. *Id.* (from 4,207 in 2006 to 7,310 in 2007).

Under the FLSA, collective action procedure has a significant impact on the outcome of litigation. The Eleventh Circuit's decision creates an all-or-nothing approach to high stakes litigation. Once a collective action on behalf of thousands of employees proceeds past decertification to trial, the wage claims of all the members of the collective will succeed or fail based upon

the testimony of a small fraction of plaintiffs. That is especially true if, as here, the court instructs the jury to decide the claims of the non-testifying plaintiffs based on the claims of the "representative plaintiffs who did testify." Doc. 719 at 10. The unfairness in this approach is sure; the only question is on which side of the *v.* it will fall. As the court in *Johnson v. Big Lots* recently observed, a collective verdict for the plaintiff would necessarily rest on less-than-representative proof and would impose liability to many employees who would be found exempt as a matter of law in individual litigation. 561 F. Supp. 2d at 588. On the other hand, a collective verdict for the defendant would extinguish all the plaintiffs' claims, even those who were obviously misclassified and could never be found exempt on an individual basis. *Id.*

This case epitomizes this inevitable unfairness. Within the 1,424 Plaintiffs in this case, there are some who were likely misclassified. In fact, the District Court granted judgment on behalf of 163 Plaintiffs whom payroll records showed did not supervise two or more full-time employees as a matter of law. *See* App. 89a. Yet had the verdict been in favor of Family Dollar, any misclassified employees would have lost their claims in the collective process.

On the other hand, the 1,424 Plaintiffs certainly included some who were exempt as a matter of law. In fact, two store managers who received notice in this case but filed suit in another district were held to be exempt on summary judgment. *See Fripp v. Family Dollar Stores*, No. 2:03-721-18BG (D.S.C. Sept. 27, 2004); *Davis v. Family Dollar Stores*, No. 3:03-170-22BC (D.S.C.

Sept. 28, 2004). Several other Plaintiffs—like Krista Allen discussed at p.9, above—provided deposition testimony that would have entitled Family Dollar to summary judgment had their claims been filed individually, not collectively. In fact, had Family Dollar been sued by the Plaintiffs individually in their home districts, it would have won more cases on summary judgment than it lost, given the law in the other circuits holding retail managers exempt as a matter of law. *See Donovan v. Burger King*, 672 F.2d 221, 225–27 (1st Cir. 1982); *Donovan v. Burger King*, 675 F.2d 516, 520–22 (2d Cir. 1982); *Jones v. Virginia Oil*, 69 Fed. Appx. 633, 637–39 (4th Cir. 2003); *Thomas v. Speedway SuperAmerica*, 506 F.3d 496, 502–09 (6th Cir. 2007); *Murray v. Stuckey's*, 939 F.2d 614, 618 (8th Cir. 1991) (holding FLSA entitles employer to "one designated exempt executive" at each freestanding store); *Murray v. Stuckey's*, 50 F.3d 564, 569–70 (8th Cir. 1995) (same); *Baldwin v. Trailer Inns*, 266 F.3d 1104, 1114–16 (9th Cir. 2001).

It is only because this case proceeded to trial as a collective action that Family Dollar is now liable for overtime and liquidated damages to all 1,424 Plaintiffs. This $35 million judgment against Family Dollar shows how § 216(b)'s procedure, if left unchecked, can have devastating substantive consequences.

Conclusion

For these reasons, the Court should grant the petition.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 16, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-12398

D.C. Docket No. 01-00303-CV-UWC-W

JANICE MORGAN, BARBARA RICHARDSON,
on behalf of themselves and all others
similarly situated, et al.,

Plaintiffs-Appellees,

versus

FAMILY DOLLAR STORES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(December 16, 2008)
(As Amended Dec. 22, 2008)

Before DUBINA, HULL and FAY, Circuit Judges.

Appendix A

HULL, Circuit Judge:

The Court *sua sponte* issues this corrected opinion. An opt-in class of 1,424 store managers, in a collective action certified by the district court, sued Family Dollar Stores, Inc. ("Family Dollar") for unpaid overtime wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. During an eight-day trial, the Plaintiffs used Family Dollar's payroll records to establish that 1,424 store managers routinely worked 60 to 70 hours a week and to quantify the overtime wages owed to each Plaintiff. Family Dollar focused on its affirmative defense that the store managers were executives within the meaning of the FLSA and exempt from its overtime pay requirements.

The jury found that the Plaintiff store managers were not exempt executives and that Family Dollar had willfully denied them overtime pay. The jury awarded $19,092,003.39 in overtime wages. The court entered a final judgment of $35,576,059.48 against Family Dollar consisting of $17,788,029.74 in overtime wages and an equal amount in liquidated damages.

Because of the complex procedural history from 2001 to 2005 that led to the case being certified as a collective action, the subsequent eight-day trial in 2006, and Family Dollar's myriad challenges on appeal, we preface the opinion with a table of contents:

Appendix A

I. PROCEDURAL HISTORY FROM 2001-2005 5
- A. Complaint
- B. April 2001 Motion to Facilitate Nationwide Notice
- C. October 2001-Second Motion to Facilitate Nationwide Notice
- D. July 2002 Notice
- E. October 2002-Third Motion to Facilitate Nationwide Notice
- F. November 2002 Order and Fact Findings
- G. December 2002 Notice to Potential Opt-Ins
- H. Discovery Disputes
- I. May 2004 Motion to Decertify the Collective Action
- J. January 2005 Order and Fact Findings
- K. First Jury Trial

II. SECOND JURY TRIAL IN 2006 21
- A. Corporate Structure
- B. Store Managers
- C. Family Dollar Executives
- D. District Managers
- E. Salary Compared to Hourly Wages
- F. Judgment/Verdict

III. DECERTIFICATION 52
- A. FLSA's Similarly Situated Requirement
- B. Two-Stage Procedure for Determining Certification
- C. District Court's Denial of Decertification

IV. EXECUTIVE EXEMPTION DEFENSE 69
A. FLSA's Executive Exemption
B. Primary Duty Is Management
C. Family Dollar's Motion for Judgment as a Matter of Law
D. Other Circuits' Cases
E. 163 Individual Plaintiffs Granted Judgment on Executive Exemption Defense

V. REPRESENTATIVE TESTIMONY 96

VI. WILLFULNESS AND LIQUIDATED DAMAGES 106
A. Willful Violation
B. Good Faith and Liquidated Damages

VII. JURY INSTRUCTIONS 112

VIII. CONCLUSION 119

Appendix A

I. PROCEDURAL HISTORY FROM 2001-2005

A. Complaint

Family Dollar is a nationwide retailer that operates over 6,000 discount stores that sell a wide assortment of products, including groceries, clothing, household items, automotive supplies, general merchandise, and seasonal goods.[1] In January 2001, Janice Morgan and Barbara Richardson, two store managers, filed a Complaint on behalf of themselves "and all other similarly situated persons," alleging that Family Dollar willfully violated the FLSA by refusing to pay its store managers overtime compensation.

The first Complaint asserted that Family Dollar paid store managers a salary, required them to work 60 to 90 hours a week, and refused to compensate them for overtime. According to Plaintiffs, store managers are managers only in name and actually spend the vast majority of their time performing manual labor, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms. Store managers spend only five to 10 hours of their time managing anything. Plaintiffs sought

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1. Family Dollar opens around 500 stores a year. Family Dollar had 2,900 stores in 1999, 4,545 stores in 2003, 5,700 stores in 2005, and has over 6,000 stores now. Here, we recite the remaining facts in this case based on Family Dollar's organization during the time frame relevant to this case, which is 1999 to 2005.

unpaid benefits, overtime compensation, and liquidated damages due to Family Dollar's willful FLSA violations.

The Complaint urged the district court to issue notice of the action to all similarly situated Family Dollar employees nationwide, and to inform them of their right to opt into the suit as a collective action. Plaintiffs relied on 29 U.S.C. § 216(b), which authorizes courts to maintain a case as one collective action so long as the employee-plaintiffs are similarly situated.

Family Dollar's Answer raised a number of affirmative defenses. It asserted that its store managers were exempt executives[2] and denied any violations were willful. Family Dollar also argued that a collective action, under § 216(b), was impermissible because (1) the store managers were not similarly situated, (2) Plaintiffs' claims were not representative of others in the group, and (3) Plaintiffs could not satisfy § 216(b)'s requirements for maintaining a collective action.

In May 2001, Plaintiffs filed their Third Amended Complaint on behalf of Morgan and Richardson, and added Cora Cannon and Laurie Trout-Wilson as Plaintiffs. The Third Amended Complaint raised the same claims for overtime pay and, again, urged the district court to notify other similarly situated store managers of the action.

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2. The FLSA provides that its protections "shall not apply with respect to . . . any employee employed in a bona fide executive . . . capacity." 29 U.S.C. § 213(a)(1).

B. April 2001 Motion to Facilitate Nationwide Notice

In April 2001, Plaintiffs moved the district court to (1) certify the case as a collective action, (2) authorize notice "by first class mail to all similarly situated management employees employed by Family Dollar Stores, Inc. at any time during the three years prior to the filing of this action to inform them of the nature of the action and their right to opt-into this lawsuit," and (3) order Family Dollar to "produce a computer-readable data file containing the names, addresses, Social Security number and telephone numbers of such potential opt-ins so that notice may be implemented." In May 2001, the court denied the motion for immediate notice, but indicated the motion was "overruled without prejudice."

In September 2001, the district court issued a scheduling order pursuant to Rule 16(b).[3] The order indicated that the parties mutually agreed to "an initial period of discovery limited to identification of claims and their factual basis," and that, despite Family Dollar's opposition, Plaintiffs would request the court to facilitate notice on or before February 2002. Discovery was to expire on October 1, 2002.

3. In this opinion, our reference to a "Rule," unless otherwise stated, is to the Federal Rules of Civil Procedure.

C. October 2001-Second Motion to Facilitate Nationwide Notice

In October 2001, Plaintiffs renewed their motion to facilitate notice. Family Dollar twice opposed Plaintiffs' motion and urged the district court to delay ruling to allow more discovery. At oral argument in April 2002, the court withheld ruling pending additional discovery by Family Dollar, and ordered Plaintiffs' counsel to make all named Plaintiffs available for deposition. In April 2002, before the court ruled on the renewed motion, the parties jointly agreed to send limited notice of the suit to current and former store managers that worked in the regions where the named Plaintiffs worked from July 1, 1999 to the present. As a result, the court denied Plaintiffs' October 2001 motion as moot.

D. July 2002 Notice

In July 2002, the parties notified 784 potential class members in Region 4 (which contains 15 Family Dollar districts in Alabama, Mississippi, Louisiana, Georgia, and Tennessee), district 39 (in Georgia), and district 118 (in New York). The jointly-sent notices required the recipients to mail their consent forms by October 22, 2002. In August 2002, the court extended the discovery deadline by 120 days.

By October 2002, 142 store managers from different states had filed consent forms. Plaintiffs' counsel subsequently sent each of those store managers an 11-page questionnaire with 17 questions and 75 total

subparts. The questionnaire asked about employment dates, weekly work hours, day-to-day duties, amount of hours spent on manual labor, what independent authority store managers had, whether district managers made all important managerial decisions, whether hourly assistant managers performed the same duties, and a host of other questions relating to Family Dollar store operations.

E. October 2002—Third Motion to Facilitate Nationwide Notice

In October 2002, Plaintiffs renewed their motion to facilitate nationwide notice. Plaintiffs' motion estimated that approximately 11,164 current or former store managers had no notice of the action and that, based on the approximately 20% response rate, a sizeable number of potential class members would opt into the suit. Plaintiffs' motion and counsel's affidavit summarized the responses to the 11-page questionnaire. Plaintiffs argued that the opt-ins' responses showed that the store managers were similarly situated and that there were enough initial responses to warrant nationwide notice.

Plaintiffs also offered the Rule 30(b)(6) deposition testimony of Bruce Barkus, the Executive Vice President of Store Operations at Family Dollar. Barkus admitted that the store manager job description is the "current and only job description[ ] for Family Dollar Store Managers," and acknowledged that Family Dollar made no inquiry into how many hours a week store managers actually work or whether store managers'

actual day-to-day duties mirror the ones outlined in the job description. Plaintiffs argued that Barkus's testimony bolstered the questionnaire responses that showed store managers spent 90% of their time on manual tasks.

F. November 2002 Order and Fact Findings

In November 2002, the district court, acting pursuant to § 216(b), granted Plaintiffs' motion to facilitate nationwide class notice to "all former and current Store Managers who work and/or worked for the Defendant over the last three years." The court found Family Dollar's store managers were similarly situated within the meaning of § 216(b) because they: (1) worked 60 to 80 hours a week; (2) received a fixed salary and no overtime pay; (3) spent 75 to 90% of their time on non-managerial tasks such as stocking shelves, running the cash registers, unloading trucks, and performing janitorial duties; (4) did not consistently supervise two or more employees; (5) lacked the authority to hire, discipline, or terminate employees without first obtaining permission from their district managers; (6) could not select outside vendors without their district managers' permission; (7) worked no less than 48 hours a week under the threat of pay cuts or loss of leave time; and (8) arrived at work before the store opened and stayed until after closing.

Although the district court acknowledged that there existed "some differences between the named-Plaintiffs and the opt-ins in terms of pay scale and job duties,"

it concluded that "these differences do not preclude the facilitation of nationwide service." The court stressed that Plaintiffs must only be "similarly situated"—not "identically situated." The court considered Family Dollar's contention that its stores have "different locations, are of various sizes, and sell different volumes of merchandise." But the court found that those differences did not undermine the factual basis for concluding that Family Dollar's store managers were similarly situated. The court emphasized that it had the benefit of making its decision after twenty months of litigation, considering Plaintiffs' motion to facilitate nationwide notice on two previous occasions, and giving Family Dollar an opportunity to depose the named Plaintiffs. The court found that a sufficient number of similarly situated employees likely were interested in joining the suit and that the case could be managed and resolved in a single litigation.

G. December 2002 Notice to Potential Opt-Ins

In December 2002, Plaintiffs' counsel mailed 12,145 notices nationwide to current and former Family Dollar store managers employed on or after July 1, 1999. Each had until February 25, 2003 to return the enclosed consent forms. Each mailing included the 11-page questionnaire. By March 2003, nearly 2,500 current and former Family Dollar store managers had joined the litigation.

H. Discovery Disputes

Throughout the litigation, the district court resolved scores of discovery-related motions. For example, Plaintiffs refused to turn over certain questionnaire responses based on attorney-client privilege. This triggered various motions to compel. In another instance, Family Dollar refused to provide Plaintiffs with information related to the identity of its district managers. Plaintiffs responded with their own motions to compel. Meanwhile, a fight over depositions was brewing. In March 2003, Family Dollar notified Plaintiffs of its intent to depose, either in person or by written questions, all opt-in Plaintiffs.

The court extended discovery until August 29, 2003. And in June 2003, in a comprehensive order, the court (1) required Plaintiffs' counsel to produce the questionnaire responses used to support Plaintiffs' motion to facilitate nationwide notice; (2) ordered Family Dollar to produce the names, addresses, and telephone numbers of all former Family Dollar district managers since June 1999; (3) prohibited Plaintiffs' counsel from engaging in *ex parte* communication with former Family Dollar district managers; and (4) clarified that "this Court shall . . . treat each opt-in Plaintiff as a separate party for purposes of enforcement of the Scheduling Order."

Discovery issues continued to surface. The court again extended deadlines for discovery to December 12, 2003, and for dispositive motions to January 12, 2004.

Appendix A

In October 2003, Family Dollar informed Plaintiffs that it intended to depose all remaining opt-in Plaintiffs, using written questions, pursuant to Rule 31. In November 2003, Family Dollar's counsel sent a letter stating it planned to take 2,100 depositions in seven days, using 338 written questions per deponent, from December 6 to 12, 2003, in Birmingham.

Plaintiffs moved for protective orders to limit the number of depositions to two a day until the end of discovery and to prevent Family Dollar from deposing the nearly 2,100 opt-in Plaintiffs. Plaintiffs' motion noted that discovery had been ongoing for two and a half years, and that prior to October 2003, Family Dollar failed to depose any of the opt-in Plaintiffs. Plaintiffs objected to Family Dollar's attempt to depose 2,100 opt-in Plaintiffs during the last 29 days of discovery as burdensome, unreasonable, and expensive. In November 2003, Family Dollar moved for a protective order, prohibiting disclosure of the written deposition questions to the opt-in Plaintiffs.

In January 2004, the district court issued a discovery management order resolving many issues. The court limited Family Dollar to "not more than" 250 depositions of the opt-in Plaintiffs, "including those who [had] already been deposed." The court did not restrict Family Dollar to written questions, but limited depositions to five per day (each three hours long). The order authorized Plaintiffs to select 250 opt-ins for Family Dollar to depose in-person. The court pushed the discovery deadline back to April 12, 2004, with

dispositive motions due May 12, 2004. It denied both parties' motions for protective orders as moot.

In late January 2004, Family Dollar moved to clarify or alter the discovery management order. In early February 2004, the district court denied Family Dollar's request to depose the rest of the opt-in Plaintiffs under Rule 31 (written deposition questions), but granted Family Dollar leave to use Rule 33 (interrogatories) to obtain discovery from the remaining opt-in Plaintiffs. In March 2004, the court issued an order clarifying that Family Dollar was entitled to serve 25 interrogatories on every opt-in Plaintiff.

By mid-February 2004, 152 opt-in Plaintiffs (of the 250) had not been deposed in-person. The court gave Plaintiffs' counsel seven days to provide Family Dollar with a list of the remaining 152 opt-in Plaintiffs and the dates that each would be available for deposition in Birmingham. To ensure Family Dollar had an opportunity to depose the remaining 152 opt-in Plaintiffs in Birmingham, the district court, in late February 2004, also ordered Plaintiffs' counsel to provide Family Dollar with three days notice of any change in scheduled depositions, and threatened to dismiss opt-in Plaintiffs who failed to attend. For the next several months, the court dismissed with prejudice various opt-in Plaintiffs for their failure to appear at depositions in Birmingham.

By the end of discovery, Family Dollar deposed, in person, 250 opt-in Plaintiffs and the named Plaintiffs.[4]

In addition to the 250 depositions of the opt-in Plaintiffs, the parties deposed Family Dollar's executives, district managers, various experts, and other witnesses. Family Dollar produced voluminous payroll records, store manuals, emails, and other communications. Plaintiffs produced the individual responses to the questionnaire. The record was fully developed before the next critical step in this case.

I. May 2004 Motion to Decertify the Collective Action

In May 2004, Family Dollar moved to decertify the collective action under § 216(b). Relying on affidavits and a wealth of information revealed during discovery, the parties briefed whether the case should proceed as 1,424 individual actions[5] or as a § 216(b) collective action. Family Dollar argued (1) the opt-in Plaintiffs were not

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4. Although the court permitted Family Dollar to send interrogatories to the remaining opt-in Plaintiffs, it does not appear Family Dollar did so (at least from the record before us).

5. The total number of opt-ins began at around 2,500 but was reduced over time to 2,100 and ultimately decreased to 1,424 based on numerous events, such as failure to appear for depositions, bankruptcy filings, and other district court rulings. We use 1,424 because that is the number of Plaintiffs left when the case was tried.

similarly situated under the FLSA, because their day-to-day job duties were too different; (2) the executive exemption defense is inherently individualized; and (3) discrepancies in the store managers' duties made a collective trial impossible and unfair.

In response, Plaintiffs pointed out that discovery established that all store managers were similarly situated because they (1) have the same job description, (2) spend 75 to 90% of their time on the same non-management duties, and (3) spend little time on the management duties in their job description. In addition to Barkus's testimony, Plaintiffs emphasized the deposition testimony of two other Family Dollar executives, Bill Broome and Dennis Heskett, indicating that Family Dollar applied the overtime exemption across the board without any consideration of store-by-store variables, and that store size and location did not affect Family Dollar's decision to exempt all store managers from overtime pay requirements.[6]

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6. Broome testified:

> Q. Now, Family Dollar has not done a study about the duties of store managers in relation to whether they should be exempt or non-exempt for overtime purposes, has it?
>
> A. Not that—I don't know, not that I'm aware of.
>
> Q. You're the official company spokesman, as you told us; correct? Now, Family Dollar has simply said all the store managers are exempt, every one of them; right?

(Cont'd)

Appendix A

(Cont'd)

A. Yes, Sir.

. . .

Q. You said every store's manager is considered exempt. And when you said "every," you meant regardless of store size, number of employees, whether it's rural or urban, no matter what its profits, no matter what anything; you just said they're all exempt, didn't you?

A. All of our store managers are salaried, yes, sir, in every store.

Q. Doesn't matter how many employees are in the store, they're all just exempt?

A. All the stores of Family Dollar, yes, sir.

Heskett testified:

Q. Does a store's location, whether it's rural or urban affect whether a store manager is exempt from overtime?

A. Not than I'm aware of.

Q. Does the store's size affect whether a store manager is exempt from overtime?

A. Not than I'm aware of.

. . .

Q. Does staff size, the number of employees supervised, does that affect whether the store manager gets paid overtime?

A. Not than I'm aware of.

(Cont'd)

J. January 2005 Order and Fact Findings

In a January 2005 order, the district court denied Family Dollar's motion to decertify, determined that none of the factual findings in its November 2002 order had been called into question, and made additional fact-findings. The court's order also expressly incorporated those 2002 findings by reference.

In addition, the court found that the "evidence confirm[ed] that substantial similarities exist in the job duties of the named and opt-in Plaintiffs." The court found that 90% of the named and opt-in Plaintiffs (1) interview and train employees, (2) direct work of employees, and (3) maintain production and sales records.

The court also found that the named and opt-in Plaintiffs had similar restrictions on the scope of their responsibilities. Although classified as store managers, they lacked independent authority to hire, promote,

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(Cont'd)

> Q. Do you know anything about stores that varies from store to store that affects whether the store managers get paid overtime?
>
> A. None that I can think of.
>
> Q. In fact the company has made a determination that all store managers for all stores will not get paid overtime at overtime rates, hasn't it?
>
> A. Our managers are salaried and have been as far as I know for a long time.

discipline, or terminate assistant managers; award employees pay raises; or change weekly schedules of hourly employees. And 90% lacked the power to close the store in an emergency without the district manager's permission. The court concluded that none of the named and opt-in Plaintiffs were responsible for the "total operation of their stores," and that, in reality, district managers performed the relevant managerial duties. The court found:

> [m]uch of the management discretion which would ordinarily be exercised by store managers is exercised by the district management pursuant to corporate policies and practices set at headquarters. The store managers are very closely supervised by the district managers. In terms of managerial duties, the district manager is more directly responsible for the operation of a Family Dollar store than the store manager.

The court also determined that Plaintiffs similarly spent their time between managerial and non-managerial duties. It found that most (90%) of the named and opt-in Plaintiffs (1) "spend only a small fraction of their time performing managerial duties"; (2) "spend the vast majority of their time on essentially non-managerial duties such as unloading trucks, stocking shelves, working as cashiers, and performing janitorial duties"; and (3) shared some of their managerial duties with nonexempt, hourly employees (ordering merchandise, controlling store keys, opening and closing the store,

depositing money in banks, and approving checks, refunds, and returns).

Viewing the evidence "as a whole," the court found that (1) the primary duties of Plaintiffs were not managerial; (2) the time spent performing non-managerial duties did not significantly differ from store to store, district to district, or region to region; and (3) the relative importance of the non-managerial duties (as compared to the limited number of managerial duties) did not vary significantly depending on the store or district. Further, "the basic pay rates of the named and opt-in Plaintiffs are also similar," in that Family Dollar paid "all of its store managers a base salary regardless of the weekly hours they work." The court determined that Family Dollar's defenses were not so individually tailored to each Plaintiff that a collective action would be unmanageable. Because substantial similarities existed in the Plaintiffs' job duties, and the same policies and procedures applied to each store, the court concluded that the case could be fairly tried as a collective action.[7]

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7. In May 2004, the court denied Family Dollar's motions for summary judgment, which were based on the statute of limitations, the executive exemption defense, and judicial estoppel. Family Dollar filed a number of motions for reconsideration, and in July 2004, the court granted Family Dollar summary judgment on the two-year statute of limitations as to 54 Plaintiffs and on the three-year statute of limitations as to eight Plaintiffs. This appeal does not involve those rulings.

Appendix A

K. First Jury Trial

In February 2005, the court entered a pretrial order summarizing each party's trial position. Family Dollar did not contest that it engaged in interstate commerce or that it failed to pay its store managers time and a half for any work over 40 hours a week. Its success at trial would turn on whether Family Dollar proved its store managers were exempt executives.

Before the first jury trial, the court allowed the Plaintiffs to represent the opt-in members as a whole. Family Dollar argued that Plaintiffs were not similarly situated, repeatedly sought decertification, and alternatively argued the Plaintiffs should be divided into nine subgroups. The court denied Family Dollar's requests and allowed the case to be tried as a collective action with the Plaintiffs representing (and thus binding for good or bad) the opt-in members as a whole. In the first trial, the jury deadlocked. Therefore, the issues on appeal arise out of the second trial.

II. SECOND JURY TRIAL IN 2006

The second jury trial lasted eight days. This time the jury reached a verdict, expressly finding the store managers were not exempt. The parties called 39 witnesses—store managers, district managers, corporate executives, payroll officials, and expert witnesses. In total, the testifying store managers worked at 50 different Family Dollar stores. The testifying district managers ran the operations of 134 different

stores. Two testifying Family Dollar executives oversaw 1,400 stores, while a third testifying executive was in charge of all stores.

The parties presented hundreds of Family Dollar's records detailing its policies and procedures. These records included Family Dollar's Store Policy Manual, subsequent manual revisions, four volumes of the Professional Development Training Reference Book, the Personnel Training Manual, various Frequently Asked Question documents, "Weekly Work Schedules," and emails by district managers to store managers. The parties also introduced a large volume of payroll records showing (1) the number of hours worked by each Plaintiff store manager each week, (2) each store manager's salary and rate of pay, and (3) the number of hours every employee worked each week. Both parties submitted multiple exhibits summarizing payroll data in easy-to-digest charts.

Given the jury's verdict and our standard of review, we outline the trial evidence in the light most favorable to the Plaintiffs.[8]

8. Family Dollar repeatedly moved for judgment as a matter of law, including at the close of the evidence and after the jury's verdict. We review a district court's denial of a motion for judgment as a matter of law *de novo*. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1275 (11th Cir. 2008); *Millennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293, 1299-1300 (11th Cir. 2007). "The question before the district court regarding a motion for judgment as a matter of law (Cont'd)

Appendix A

A. Corporate Structure

Family Dollar is a publicly held, nationwide retailer that operates over 6,000 discount stores in 40 states and the District of Columbia. It has annual sales of around $5 billion and annual net profits ranging from $200 to 263 million from 1999 to 2005. Its individual stores have average annual sales of $1 million, and average net profits of 5 to 7%, or $50,000 to $70,000.

Family Dollar structures store operations into five divisions (each headed by a vice-president), 22 regions (each headed by a regional vice-president), and 380 districts (each overseen by a district manager). Each district contains multiple stores. Each district manager

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remains whether the evidence is 'legally sufficient to find for the party on that issue,' Fed. R. Civ. P. 50(a)(1), regardless of whether the district court's analysis is undertaken before or after submitting the case to the jury." *Chaney v. City of Orlando*, 483 F.3d 1221, 1227 (11th Cir. 2007). " 'In considering the sufficiency of the evidence that supports the jury's verdict, we review the evidence in the light most favorable to, and with all reasonable inferences in favor of, the nonmoving party.' If reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions based on the evidence presented, the motion should be denied." *Millennium Partners, L.P.*, 494 F.3d at 1299-1300 (quoting *Montgomery v. Noga*, 168 F.3d 1282, 1289 (11th Cir. 1999)). "We will reverse only if the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict." *Goldsmith*, 513 F.3d at 1275 (internal quotation marks omitted).

supervises the operations of 10 to 30 stores. Some districts are small with multiple stores in an urban area. Other districts are larger with small stores in small towns. The district manager's office is housed within one store in the district.

Family Dollar's corporate office issues instruction manuals with operating policies that apply uniformly to all stores nationwide. No matter the size of the store or the district, every detail of how the store is run is fixed and mandated through Family Dollar's comprehensive manuals.

B. Store Managers

Family Dollar has the same job description for all store managers and lists their "Essential Job Functions" as:

> 1. Supervise all store personnel, including assigning tasks, ensuring compliance with merchandising and operational policies, and locking and unlocking store.
>
> 2. Prepare, complete and transmit store reports as required.
>
> 3. Count money/checks, prepare bank deposits and travel to bank.
>
> 4. Count petty cash, get change from bank, unlock petty cash drawer and give change to cashiers as needed in registers.

Appendix A

5. Post net sales in Beat Yesterday Book.

6. Train Cashiers and Stock Clerks through verbal instructions and non-verbal demonstration.

7. Count stock, calculate amount to order, use MSI machine to order and transmit, calculate additional goods needed for ad bulletins and endcap programs.

8. Read, plan and stock schematics for proper merchandising.

9. Practice cash control policies; including check approvals, refund and exchange approvals, layaway approvals (when applicable).

10. Work as Cashier when needed and be able to perform all Cashier tasks, including but not limited to:

- Ring up sales on cash register, receive money/check and count correct change to customer; hold and use register key while on shift.

- Scan merchandise labels and place merchandise in bags.

- Count money in cash register when coming on and leaving shift; write and sign the Balance & Declare Slip at end of shift.

Appendix A

• Clean cash register area using cleaning solutions and paper towels; sweep mat, dressing room and entry areas as necessary.

• Verbally greet each customer as they enter the store; receive bags and staple labels to each bag customer brings into store.

• Straighten and restock gum, candy and other areas on register.

• Attach labels and software to merchandise using Meto gun; place price stickers on hardliners merchandise; read pre-printed labels and use Swiftach machine to attach softline merchandise.

• Place merchandise on correct clothes hangers, button/zip and hang on rack as needed.

• Cut register tapes and tape to appropriate packages.

• Unpack shipping packages (totes) and prepare for shelf placement.

• Monitor dressing room, including opening door, counting merchandise and checking after customer leaves.

- Watch suspected shoplifters; ring front bell to notify other employees of situation needing help.

11. Work as Stock Clerk when needed and be able to perform all Stock Clerk tasks including but not limited to:

- Unload incoming freight off trucks; count incoming boxes and verify correct receipt and log in freight log.

- Open boxes, check for damaged goods and remove merchandise.

- Stock shelves with merchandise, including bulky and heavy goods.

- Pack merchandise, complete transfer labels and seal cartons for outgoing shipment.

- Organize and maintain layaway bins.

- Maintain organization of sign and pricing area.

- Store and remove seasonal repacks as necessary.

- Perform simple maintenance such as changing light bulbs, moving shelving and panels.

Appendix A

The overwhelming evidence showed that Plaintiff store managers exercise little discretion and spend 80 to 90% of their time performing manual labor tasks, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms. Even as to the assigned management tasks, such as paperwork, bank deposits, and petty cash, the store manual strictly prescribes them. And district managers closely scrutinize store managers to ensure compliance with the manual and corporate directives.

Family Dollar forbids outside janitorial help, and store managers lack authority to hire outside vendors. Store managers, just as hourly employees, are expected to clean the store. For the purposes of "End of Day Recovery," the manual requires that "[t]wo hours before closing, all employees are to stop their current projects and begin a systematic cleaning and straightening up of the store. (The only exception would be the Cashier who is ringing up sales.) If the store has been shopped heavily, more time may be required to satisfactorily recover." The manual specifies the trash must be emptied (after checking for hot cigarette butts), the floors must be swept every day, and the floors must be mopped with clear water at least once a week. Rest rooms must be cleaned and mopped daily, stocked with toilet tissue, paper towels, and a trash container that is to be emptied daily. "Under no circumstances should there be merchandise, equipment or fixtures in the rest rooms."

Appendix A

Store managers routinely perform janitorial duties. The manual even prescribes how janitorial tasks are to be performed:

> Each morning the sidewalk is to be swept, the parking lot is to be free of debris, the rides wiped clean and checked for safety reasons, the drink machine wiped clean, the trash cans emptied, the window ledges cleaned of cobwebs and dust, and the windows washed as necessary.
>
> Weeds must be removed. Do not allow weeds to grow around the building in the front or back. Pay special attention to the sidewalk area in front of the store. Remove any weeds that may be growing here.
>
> The back of the building (the entire perimeter, if the building is free standing) is to be maintained just as the front. No shopping carts, fixtures or blue totes are to be stored outside. If there are problems with people using the store's dumpster or leaving large items behind the store, contact the District Manager for instructions.
>
> . . .
>
> Sweep mats as often as necessary during the day to maintain a clean and neat appearance. If the mat has spots, they are to be removed with a spot remover. Remove chewing gum by hardening the gum with ice, then pulling the gum off.

> If the entrance mats get wet, hang them for a few minutes. The water will drain off the mat.
>
> With respect to indoor janitorial duties:
>
> The windows are to be kept free of cobwebs and dusted daily. The window ledges are also to be maintained daily as needed, free of dust and debris.

Store managers lack discretion over the store's merchandise selection, prices, sales promotions, and layouts—all are set by the home office and district managers. For example, each store is provided a schematic layout and diagram of the store which shows (1) where each shelf must be, (2) what product goes on each shelf, (3) how all merchandise is to be displayed, (4) how all signs, merchandising, and display information is to be used, (5) how each "end cap" (the end of an aisle or gondola) should be displayed, and (6) what promotional product goes on the end cap. Every month, corporate headquarters mails each store a promotional programs booklet that contains the monthly planning calendar and a number of merchandise programs. The manual admonishes that "any deviation from the company program must have the District Manager's approval."[9]

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9. As provided in the manual, Family Dollar's computer system replenishes "basic merchandise" items. A register informs the system of every sales transaction at the store. Based on prior selling history and the current inventory level, the system determines the amount of goods needed to maintain

(Cont'd)

Appendix A

The tiniest of details are governed by the manuals. For example, the manual's "Clip Boards in the Office" page details how a store must structure its clip boards.[10] Even the four drawer cabinets, located in every store, are organized identically.[11] The manual also has a subsection on "Break Area and Coffee Pots." It states that "Appliances such as coffee pots, microwave ovens, refrigerators, etc., must be approved by the District Manager. Whoever makes the coffee is responsible for unplugging the coffee pot when not in use." The manual instructs: "Do not use the on/off switch as this can be left on by mistake and create a fire hazard. Make

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the "maximum on hand allowance." In addition, each store orders merchandise on a preassigned order day, which is delivered on a preassigned "truck day."

10. For example, the top row must include, from left to right, Monthly Promotional Programs, Ads and Ad Planners, Pending Schematic and MSI Label Changes, Current Store Order and Stop Shipments, DM Notes and Latest DM Audit, Messages and EDLP Notes, and a Housekeeping Checklist.

11. Drawer One contains the petty cash box, bank deposit bags, register keys, extra keys, stamps, and an extra till bag. Drawer Two houses items such as unauthorized price change reports and area change reports. Drawer Three holds the open direct summary file, packing slips, credit memos, direct shipment notifications, and processed billing summaries. Drawer Four has messages, payroll, personnel, drug screening, resignation verification, employee evaluations, warning forms, blank applications, completed applications, and a variety of other forms.

periodic checks throughout the day and before closing to assure that it has been unplugged."

Store managers must follow strict rules regarding store keys, bank deposits, petty cash, and store operating hours. For example, the manual requires there be $300 in petty cash, divided into $200 in the petty cash-box for making register change, and $50 in beginning funds for each of the two registers. In some cases, the petty cash amount may be increased due to the volume of business with the district manager's and regional vice-president's approval and notification to the Cash and Sales Department. The manual indicates that "[t]he amount of the store's Cash Accumulation is to be set by the District Manager . . . . [and] should be posted in the petty cash box using the 'Cash Accumulation Card.' " Store managers have the same paperwork to do and time frame in which to do it.

Further, each store has a preassigned "truck day" when the company truck delivers merchandise to the store. Because of the volume of unloading and stocking, the store manager always works "truck day." The store manager helps unload 800 to 1,500 cartons from the truck to the storeroom and stock the shelves.

The evidence also showed that store managers are assigned a fixed payroll budget, with total labor hours to come from that budget each week, and are required to use only hourly employees. As detailed later, store managers have scant discretion to act independently of their district managers.

C. Family Dollar Executives

Plaintiffs called two Family Dollar executives who testified about store managers' roles in the Family Dollar corporate hierarchy. Bruce Barkus started with Family Dollar in 1999, oversaw all stores, and reported to the President. He testified that Family Dollar classified store managers as executives, across the board, without ever determining how store managers spent their time:

> Q. Okay. And Family Dollar never did any study of the hours that the store managers were spending in the stores working, have they?
>
> A. No.
>
> Q. And Family Dollar never studied the tasks that the store managers were doing, working in the stores?
>
> A. No.
>
> Q. Family Dollar's never studied or tried to determine how much time they spent on each task in the stores?
>
> A. There was some work done on the door to floor, you know, how much time was receiving trucks.
>
> Q. But that was not for purposes of looking at their managerial duties?

A. No, sir.

Q. Family Dollar's never studied or looked into the managerial duties or the amount of time spent on managerial duties by store managers, have they?

A. No, sir.

Q. And Family Dollar's never done a study or attempted to determine whether store managers are, in fact, bona fide executives, exempt from overtime, have they?

A. No.

Q. In fact, Family Dollar doesn't even have a policy addressing Fair Labor Standards Act overtime requirements, does it?

A. Not that I am aware of.

Barkus testified that in a study of how much time it took to unload trucks and get merchandise to the floor, that the "biggest chunk of the store manager's time was being spent on manual labor, unloading the trucks, getting it to the floor, and onto the shelves."

Barkus also testified that district managers ensure that store managers do not exceed the fixed payroll budgets assigned by corporate management. A store manager that goes over budget, by even a penny, could

be fired.[12] Because store managers are under orders that overtime labor is not allowed, they are required to do any and all work, even if the payroll budget does not allocate enough hourly employees to get the job done.[13] Cuts to a store's payroll budget necessarily reduce a store's workforce and ensure that the salaried store manager (and not the hourly employees) makes up the difference by working more hours.[14]

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12. "Q. But they have to get district manager approval if they go outside the budget, and are subject to discipline if they don't? A. They could be subject to discipline, but there's many times that they don't get approval to go outside the budget. Q. But there's also been times, as we see in these emails, where they're threatened with their job if they go one penny over their budget that's been given to them by their district manager; correct? A. I'm sure you have a document that shows that, yes."

13. "Q. And the budget limits how much payroll they have; in fact, it's just a payroll budget, isn't it? A. The budget's based on sales and store hours and then other factors. Q. Those are the elements that go into the budget. But the budget itself is just covering payroll, nothing but payroll; correct? A. It's covering hours, associate hours. Q. It tells how many associate hours that managers are allowed to have? A. Yes. Q. If that's not enough, he has to do it himself, work whatever hours it takes; right? A. Yeah. The job has to get done."

14. Plaintiffs' counsel confronted Barkus with his deposition testimony:

> Q. But you've known—we took your deposition in 2002—you told us then that that's the way the system

(Cont'd)

Appendix A

Almost all of the store manager's job is standardized and controlled by superiors. Barkus confirmed that Family Dollar makes virtually no distinction between a store manager's job duties and an assistant store manager's job duties.[15]

(Cont'd)

> works; the budget staffs the store at just a certain level, and the store manager has to make up all the other hours? A. Can you point that out to me? Q. Yes. Turn to Page 322 of your deposition. And, again, it's shifted a little bit. It's 324, line 11. "Question: In many instances, the store managers will assume the duties of those associates so that their budget stays in line, or they come in under budget; correct? Answer: Yes." A. That's correct.
>
> . . .
>
> Q. And, in fact, the people under you, your district managers, they have sent emails out saying to the store managers, "I'm cutting your budget." It means, I'm taking away the hours of your subordinates; and you work the hours, 60, 70, 80, hours, whatever, haven't they? A. I haven't seen it, but I'm sure you're referring to something. Q. Yes. Exhibits 18 and 19, 25 through 29, 32, 33, 45, 154, 168; you go through the book, you see it over and over. I'm taking your budgets away. You work the hours.

15. "Q. Do you recall the 'Essential Job Functions of the Assistant Store Manager'? A. Yes, I do . . . . Q. And the assistant store manager job description, called Essential Job Functions, is Exhibit 7. It shows that the assistant store manager, his (Cont'd)

Plaintiffs also offered the testimony of Charles William Broome, a Senior Vice-President of Store Operations, who supervised 1,400 Family Dollar stores. Like Barkus, Broome confirmed that Family Dollar never studied whether store managers were exempt executives[16] and its exemption policy did not turn on any individual factors. It was a company wide decision that applied regardless of store size, location, sales volume, or any other individual factors:

> Q. You're the official company spokesman, as you told us; correct? Now, Family Dollar has simply said all the store managers are exempt, every one of them; right?
>
> A. Yes, sir.
>
> Q. They hadn't looked at store size?
>
> A. I—I don't know how to answer that. Store managers have been salaried for the 29 years

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(Cont'd)
regularly assigned essential duties are the same ones as for the store manager; virtually word for word; correct? A. Yes." Other evidence showed that hourly assistant managers performed the same tasks as the store manager.

16. "Q. Now, Family Dollar has not done a study about the duties of store managers in relation to whether they should be exempt or non-exempt for overtime purposes, has it? A. Not that—I don't know, not that I'm aware of."

that I've been here; they were when I came. I don't know how that was arrived at.

Q. Okay. Let me ask you this. You said every store's manager is considered exempt. And when you said "every", you meant regardless of store size, number of employees, whether it's rural or urban, no matter what its risk class, no matter what its sales volumes, no matter what its profits, no matter what anything; you just said they're all exempt, didn't you?

A. All of our managers are salaried, yes, sir, in every store.

Q. Doesn't matter how many employees are in the store, they're just all exempt?

A. All the stores of Family Dollar, yes, sir.

Despite his 29-year tenure with Family Dollar, Broome had no idea where the exemption decision originated:

Q. Now, my question is, did you make that decision?

A. No, sir.

Q. Did your boss, Mr. Barkus, make that decision?

A. To my knowledge, it's been in place—it was in place when I came here 29 years ago. So—

Q. Okay. So, do you know anybody that will own up to that decision; say, "that was my decision"?

A. I do not.

Q. Mr. Levine, has he ever told you that's his decision?

A. No, sir.

Q. Can you give us any clue? And the reason I'm asking you this, I asked you this in the deposition and we've been asking a lot of people in depositions: Who made this decision, do you know?

A. I do not.

Broome acknowledged that hourly assistant managers fill in for store managers, open and close the store, can perform all managerial tasks of the store manager, and are eligible for overtime pay.

Broome confirmed that a store's payroll budget, the budgetary outlay that dictates how many employees can work in the store, is determined by corporate

headquarters in conjunction with the district manager. Store managers are prohibited from exceeding the payroll budget and can be fired if they do.[17]

Family Dollar's corporate office generates a "staff scheduler" that uses the amount of money that the store may spend on labor and converts it into a document that delineates how many hours a week each employee should work and the total weekly labor hours for the store. According to the staff scheduler, each store manager is supposed to work 52 hours a week. Broome testified that, generally, store managers are expected to work between 48 to 52 hours, but that "as manager of the store, you're required to manage the store and do whatever it takes. I don't know that there is a specific number that's mandated."[18]

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17. "Q. If a store manager, though, goes over budget, he spends more than what he's been given by his district manager, he can be disciplined; right? A. Could be, yes . . . . Q. But you remember when I showed you store managers who were—they were threatened to be fired for going over budget; you remember that, don't you? A. There have been e-mails written stating that, yes, sir. Q. And those e-mails came from district managers to store managers telling them they'd be disciplined or fired if they spent one dime, one penny, over the budget that that district manager had given them; right? A. I don't remember the specific words, but, yes. They said that you could be disciplined up to and including termination for doing something."

18. "Q. And it always shows 52 hours for the store manager; correct? A. To the best of my knowledge, yes. Q. Because the

(Cont'd)

Appendix A

Broome's testimony was consistent with Family Dollar's "Staff Schedule Frequently Asked Questions" ("FAQ"). As to whether store managers can increase or reduce associate hours, the FAQ says they may "as long as total hours & coverage for each day & week are not increased or decreased." Similarly, as to whether the store manager can change the schedule to work "a 5 ½-day workweek instead of a 5-day workweek," the FAQ says that "[t]his change can only be made by the District Manager and should only be made as long as total hours & coverage for each day are not increased or decreased." In other words, any flexibility store managers have in scheduling is substantially constrained by the fixed payroll budget which dictates the total labor hours.

Although store managers can schedule what employees work what hours on the "weekly staff schedule" so long as the store does not exceed the payroll budget,[19] certain corporate directives further

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(Cont'd)
system is built—that is, the staff scheduler system and the store payroll budget is built on the 52-hour week assumption for the last several years, for store managers; right? A. The staff scheduler is built with 52 hours as a base for the manager, the manager's salary. So the number of hours they could work 40 and still receive their salary, or they could work 60 and still receive their salary. But it's built using that as part of the coverage."

19. Some district managers showed on the staff scheduler the days and hours that assistant managers and sales associates (Cont'd)

constrain store managers' discretion, such as the prohibition on moving employee coverage from slower days (like weekdays that did not involve unloading truck shipments) to busier days.[20]

Finally, the FAQ evinces Family Dollar's strict rules against scheduling employee overtime. The FAQ indicates that store managers cannot change the schedule of assistant managers to reflect a 48 to 52 hour workweek while they are training, and that "[i]f the change is made [by the district manager] the total hours & coverage for each day should not be increased or decreased and the store payroll budget must be met. It is very important to control the use of overtime dollars."

D. District Managers

Family Dollar's 380 district managers implement and enforce these policies and procedures. Their

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(Cont'd)
worked. But others allowed their store managers to plug in who worked when so long as they did not exceed the total allotted labor hours for the week.

20. As Broome testified: "Q. Can I move coverage from slower days, (i.e., non-truck weekdays) to Fridays, Saturdays or Sundays when we are busy? A. No. Store's schedules are designed to give coverage that are based on store volumes, store hours. Q. So this is telling store managers they can't schedule people the way they want to schedule them; correct? A. It's basically telling them they should not move coverage from slow days to the weekend."

vigorous oversight ensures that store managers comply with the operations manual's precise dictates. The operations manual states that the district managers—not the store managers—head the "store team."[21]

District managers uniformly run their stores through strict payroll budgets, to-do lists, daily emails with instructions to store managers, telephone calls, store visits, electronic execution reports, and electronic data flowing from the store's cash register on a real-time basis.[22]

Plaintiffs' witnesses explained how Family Dollar's corporate office sets a fixed payroll budget for each store and how that budget results in salaried store managers working long hours each week. The district manager transmits a set payroll budget for the upcoming 13-week period to the store managers. The budget shows the store manager's salary and a preset number of labor hours a week (to be worked by hourly employees) that must be paid for from that budget. Other than the

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21. A portion of Family Dollar's Professional Development Training Reference Book describes the "Family Dollar Store Team" in order of seniority as District Manager, Store Manager, Assistant Manager, and Associates.

22. District managers visit each store at least once a month and some visit twice a month or more. The job description for a district manager states: "Visit stores, continuously developing plans to improve performance. One store per day is to be worked Monday through Thursday, with multiple stores on Friday and Saturday if desired unless otherwise directed."

salaried store manager, Family Dollar staffs every store with only hourly employees (either the assistant manager or sales associates).[23] District managers then closely monitor each store's weekly payroll to ensure store managers do not allow overtime work and stay strictly within the fixed payroll budget and the total labor hours allotted. Plaintiffs introduced numerous emails confirming this fact.[24]

For example, at a low volume, small store, the district manager sets the store's payroll budget at around $1,400 per week. The average store manager's salary of $600 per week comes out of this budget. The remaining $800 pays the hourly employees. The payroll budget is often only enough to pay one full-time hourly assistant manager and two or three hourly sales associates. Because the store is open seven days a week and store managers are not permitted to unilaterally

23. Assistant managers work full-time, while sales associates work either part- or full-time.

24. According to the manual, district managers monitor the payroll budget by requiring every store manager to key payroll hours into the Payroll Daily Form. Store managers must enter payroll hours at the end of the day for employees that have clocked out for the day or "first thing in the morning for the employees who worked the previous day." Every Wednesday, store managers are required to print out and transmit the Payroll Daily Form. At the end of each week, store managers must record weekly net sales (i.e., the figure from the "Beat Yesterday Book") and actual payroll dollars spent, and send this information to their district managers.

schedule hourly staff for overtime, store managers routinely worked 60 to 70 hours a week to have enough floor coverage during the set store hours[25] and to complete the required manual labor.

For higher volume, larger size stores, the corporate office sets a larger payroll budget, which usually covers more hourly employees (seven to ten). But larger stores have more merchandise to stock, more cartons to unload on truck day, a need for more cashiers, and more demand for cleaning. Because the payroll budget is fixed and strictly monitored, store managers at larger stores, just like those at smaller stores, routinely work 60 to 70 hours per week and spend 80 to 90% of their time on manual labor.

District managers closely supervise the hiring and firing process. They interview and hire store managers

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25. The manual requires all Family Dollar stores to be open seven days a week for the entire year, except for Christmas Day. Corporate headquarters sets the hours-nine a.m. to seven or eight p.m. on Monday through Saturday, and noon to six p.m. on Sunday. Each store is open 72 hours a week. Only headquarters or a district manager can change a store's hours.

The manual states that "there are only two sets of keys to a Family Dollar Store." One set is for the store manager, who "should maintain possession of his or her keys at all times," and the other set is held by the assistant manager or the floor supervisor. The manual allows for a third key to be given to another employee for emergency purposes, but that employee must be recommended by the store manager and approved by the district manager.

and interview and approve the hiring of assistant managers.[26] Store managers initially interview assistant manager candidates and make recommendations to the district manager. The manual states that a "job offer is not to be made until . . . Management has received authorization to hire."

Although store managers interview and recommend hourly associate candidates, they need district manager approval to hire them. The district manager—not the store manager—also has the authority to terminate employees.[27] The manual notes that "[p]rior to

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26. Broome testified about hiring: "Q. In fact, if a store manager were to attempt to hire his own assistant without the district manager interviewing and selecting the person, they could be disciplined and fired, couldn't they? A. If they had not been given that authority by the district manager, they could be. Yes, sir. Q. I'm talking about the company policy is, that if a store manager tries to hire his own assistant instead of having the district manager do the interview and doing the hiring, they are subject to discipline, aren't they? A. They could be, yes, sir."

27. Barkus testified:

> Q. And you don't know of any training or instructions that have been given to store managers which tells them that they have the power to discharge a store employee, do you?
>
> A. I don't know of any, no.
>
> Q. And you don't know of any instructions or anything the store managers have been told that

(Cont'd)

termination, Store Management should discuss the situation and its recommendation with the District Manager, or if unavailable, with the Regional Vice President."[28]

Most store managers follow corporate policy and obtain the district manager's approval before hiring or firing hourly employees.[29] Family Dollar's policies do not

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(Cont'd)

says that they can suspend an employee in their store on their own either, do you?

A. I don't know of any, no.

Q. And, in fact, you issued an email in February 2003, which told the store managers that if they tried to hire their own assistants on their own, they would be subject to being fired, terminated, didn't you?

A. Yes, I did.

Q. And you recall no point in time during your seven years at Family Dollar that that wasn't the policy, do you?

A. No, I don't.

28. In addition, "Strand 4" of Family Dollar's Professional Development Training Reference Book provides that, "You must contact your District Managers or Regional Vice President before conducting a Discharge."

29. Some district managers allow their store managers to ignore corporate policy and hire candidates for hourly sales associates positions without obtaining district manager approval. The manual states the district manager usually meets the associate on her next store visit.

require that store managers' hiring or firing recommendations be given any particular weight. Barkus testified that district managers can veto all store managers' recommendations on hiring and firing. However, district managers frequently follow the store managers' hiring and firing recommendations.

District managers set the rate of pay for all hourly employees (assistant managers and sales associates) and must approve all pay increases.[30] District managers also evaluate hourly employee performance.[31]

Only district managers have the power to close a store for bad weather. In the "Hurricane Warning Procedures" section, the manual instructs store

30. The manual indicated that district managers must approve hourly associate raises. "The District Manager will review wage increase recommendations with the Regional Vice President. Store Managers will be informed whether or not the recommendations are granted."

31. Plaintiffs' Trial Exhibit 294 (referencing various portions of "Strand 4") states that:

> The Retention Review allows the Store Manager and District Manager to conduct a 90-day performance appraisal, provide feedback and coaching for Store Associates and to advise them of their eligibility for certain employee benefits. . . . DM will schedule in-store visits with all associates who will soon "hit" their 90-day milestone. . . . Store Manager and District Manager meet with Associate and review information contained in Retention Review.

managers that "[i]f the District manager cannot be located, contact the Regional Vice-President for recommendations regarding the course of action that should be taken."

E. Salary Compared to Hourly Wages

Both parties submitted evidence documenting the average weekly salaries of all Plaintiffs and the average hourly wages of assistant managers. Plaintiffs' evidence showed that, from 1999 to 2005, Plaintiff store managers averaged $599.71 a week in salary.[32] Despite the fact that

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32. These are the average salaries for all Plaintiffs (using their Exhibit 278) and Family Dollar's average salaries for all store managers nationwide (using its Exhibit 2324):

All Plaintiffs' Salaries	*Nationwide Salaries*
(526) 1999: $523	1999: $553
(882) 2000: $542	2000: $573
(940) 2001: $555	2001: $596
(684) 2002: $581	2002: $601
(249) 2003: $623	2003: $606
(123) 2004: $668	2004: $628
(86) 2005: $706	2005: $651

The two sets of figures do not differ materially. For example, there is only a 5% difference between the 1999 salaries. Plaintiffs' figures (for 2003 to 2005) benefit Family Dollar by suggesting that Plaintiffs made more per hour than Family Dollar attempted to show.

Store managers may earn a bonus. Although Family Dollar's brief cites testimony by a few store managers showing (Cont'd)

the salary was intended to compensate a 52-hour workweek, store managers worked 60 to 70 hours a week. In other words, from 1999 to 2005, Plaintiff store managers averaged from $9.99 an hour (using Plaintiffs' average salary figures and a 60-hour workweek) to $8.57 an hour (using Plaintiffs' average salary figures and a 70-hour workweek). During the same years, assistant managers were paid hourly and averaged $7.60 an hour.[33]

(Cont'd)

that the average bonus size was $1,800, it is difficult to factor the bonus into the salary spread between store managers and assistant managers without an indication of how often Family Dollar paid such bonuses and to what percentage of store managers. In any event, the bonus does not substantially increase the range of pay. For example, even if every store manager earned a $1,800 bonus every year, that translates into $34.61 more per week. Assuming a 60-hour workweek, that equals an extra $.58 more an hour. Assuming a 70-hour week, it amounts to $.49 more an hour. These small amounts do not alter the analysis of whether store managers earn "significantly" more than assistant managers.

33. Average hourly salary for store managers:

Store Manager's Salary ÷60 hours:	*Store Manager's Salary ÷70 hours:*	*Assistant Manager's Hourly Wage*
1999: $ 8.72	1999: $ 7.47	1999: $7.11
2000: $ 9.03	2000: $ 7.74	2000: $7.19
2001: $ 9.25	2001: $ 7.93	2001: $7.43
2002: $ 9.68	2002: $ 8.30	2002: $7.65
2003: $10.38	2003: $ 8.90	2003: $7.79
2004: $11.13	2004: $ 9.54	2004: $7.88
2005: $11.77	2005: $10.09	2005: $8.18

Assuming a 70-hour workweek, store managers earned, on average, roughly the same (less than a dollar or more per hour) than assistant managers. Assuming a 60-hour week, store managers earned approximately $2 more per hour than assistant managers in 1999 to 2003 and approximately $3 more per hour in 2004 to 2005. In either event, both sides presented this evidence in order to compare store manager salaries to the salaries of hourly store employees.

F. Judgment/Verdict

At the close of the evidence, the district court granted judgment as a matter of law to 163 of the 1,424 Plaintiff store managers, because, according to Family Dollar's charts, these 163 did not satisfy the third requirement in the executive exemption test, i.e., that they customarily and regularly directed the work of two or more other employees, as required by 29 C.F.R. § 541.1(f) (2003), 29 C.F.R. § 541.100(a) (2006). As to the remaining Plaintiffs, the jury determined Family Dollar failed to prove they were exempt executive employees.

The jury also found that Family Dollar acted willfully in denying overtime pay to all Plaintiffs. The jury awarded $1,575,932.12 in overtime pay to the 163 Plaintiffs and $17,516,071.27 in overtime pay to the remaining Plaintiffs. In calculating this overtime pay, the jury used Family Dollar's charts that documented (1) the number of hours that each of the Plaintiffs worked

per week, and (2) the amount of back pay owed per Plaintiff for the applicable period.[34]

III. DECERTIFICATION

A. FLSA's Similarly Situated Requirement

The FLSA authorizes collective actions against employers accused of violating the FLSA. 29 U.S.C. § 216(b). Section 216(b) provides that "[a]n action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or

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34. This $1,575,932.12 to 163 Plaintiffs and $17,516,071.27 to the remaining Plaintiffs totaled $19,092,003.39. Although Plaintiffs requested a much larger amount of back pay based on a rate of pay using either a 40-hour or 48-hour workweek, the $19,092,003.39 sum represented Family Dollar's own calculation of overtime back pay based on Defendant's Trial Exhibit 1959, and reflected a rate of pay based on a salary intended to compensate for a 52-hour workweek. In other words, Family Dollar's chart divided the store managers' base salary by 52 hours (not 40 or 48 hours) to determine the hourly rate of pay for Family Dollar's overtime pay calculations. Thus, the jury's use of Family Dollar's calculations substantially reduced the verdict amount, and there is no cross-appeal on that issue.

After the verdict, the district court twice adjusted the back pay amount for certain Plaintiffs for various reasons (such as bankruptcy, judicial estoppel, and standing), and ultimately entered a March 31, 2006 judgment for back pay of $16,623,989.32, and increased the amount by $1,164,040.42 on April 6, 2007, for a total back pay judgment of $17,788,029.74.

themselves and other employees similarly situated." 29 U.S.C. § 216(b). Thus, to maintain a collective action under the FLSA, plaintiffs must demonstrate that they are similarly situated. *See Anderson v. Cagle's*, 488 F.3d 945, 952 (11th Cir. 2007).

Participants in a § 216(b) collective action must affirmatively opt into the suit. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). That is, once a plaintiff files a complaint against an employer, any other similarly situated employees who want to join must affirmatively consent to be a party and file written consent with the court. *Albritton v. Cagle's*, 508 F.3d 1012, 1017 (11th Cir. 2007).[35]

Because similarly situated employees must affirmatively opt into the litigation, the decision to certify the action, on its own, does not create a class of plaintiffs. Rather, the "existence of a collection [sic] action

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35. In *Albritton*, we stated: "[Section] 216(b) requires that would-be plaintiffs affirmatively opt in, and that they do so in writing, and that the writing be filed in court before they can be included in the lawsuit." 508 F.3d at 1017. The FLSA "does not indicate that opt-in plaintiffs have a lesser status than named plaintiffs insofar as additional claims are concerned. To the contrary, by referring to them as 'party plaintiff[s]' Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs." *Prickett v. DeKalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003).

under § 216(b) . . . depend[s] on the active participation of other plaintiffs." *Cameron-Grant v. Maxim Healthcare Servs. Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) ("Under § 216(b), the action does not become a 'collective' action unless other plaintiffs affirmatively opt into the class by giving written and filed consent.").[36] The benefits of a collective action "depend on employees receiving accurate and timely notice . . . so that they can make informed decisions about whether to participate." *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 486, 107 L.Ed.2d 480 (1989). Therefore, the importance of certification, at the initial stage, is that it authorizes either the parties, or the court itself, to facilitate notice of the action to similarly situated employees. *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218 (11th Cir. 2001).[37] After being

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36. Unlike opt-in collective actions under § 216(b), a district court's decision to certify a Rule 23(b) class binds all the class members. *See Cameron-Grant*, 347 F.3d at 1249 (detailing the wide range of differences between § 216(b) collective action and Rule 23 class action); *see also Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir. 1996) ("[I]t is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23 of the Federal Rules of Civil Procedure.").

37. Although *Hipp* involved a collective action brought under the Age Discrimination and Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*, that statute incorporates the FLSA's collective action mechanism, *see* 29 U.S.C. § 626(b). Therefore, "*Hipp* . . . applies in both contexts." *Albritton*, 508 F.3d at 1014 n. 1; *Cameron-Grant*, 347 F.3d at 1243 n.2.

given notice, putative class members have the opportunity to opt-in. The action proceeds throughout discovery as a representative action for those who opt-in. *See id.*

The key to starting the motors of a collective action is a showing that there is a similarly situated group of employees. *See Anderson,* 488 F.3d at 953; *Hipp,* 252 F.3d at 1217. The FLSA itself does not define how similar the employees must be before the case may proceed as a collective action. And we have not adopted a precise definition of the term.

Without defining "similarly," we provided some guidance in *Dybach v. State of Florida Department of Corrections,* 942 F.2d 1562, 1567 (11th Cir. 1991). There, we emphasized that before facilitating notice, a "district court should satisfy itself that there are other employees . . . who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions." *Id.* at 1567-68. Later, in *Grayson v. K Mart Corp.*, we instructed that under § 216(b), courts determine whether employees are similarly situated—not whether their positions are identical. 79 F.3d 1086, 1096 (11th Cir. 1996). In other words, we explained what the term does not mean—not what it does.[38]

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38. It appears that we are not the only ones. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (referring to Eleventh Circuit's "ad hoc" approach as "[a]rguably . . . the best of the three approaches" taken by (Cont'd)

Further, we review a district court's § 216(b) certification for abuse of discretion. *Hipp,* 252 F.3d at 1217; *Grayson,* 79 F.3d at 1097. Judicial discretion in making a § 216(b) certification decision is, of course, not unbridled. Indeed, " '[a] district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous.' " *Anderson,* 488 F.3d at 953-54 (quoting *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.,* 263 F.3d 1304, 1309 (11th Cir. 2001)). The district court first must apply the proper legal standards for authorizing a § 216(b) collective action and for determining what similarly situated means. A court's determination that the evidence shows a particular group of opt-in plaintiffs are similarly situated is a finding of fact. *Anderson,* 488 F.3d at 954 (affirming decision to decertify based on conclusion "that the district court's view of the evidence is reasonable, and its findings, therefore, are not clearly erroneous"); *Hipp,* 252 F.3d at 1208 (noting that decertification decision is one where the court "makes a factual determination on the similarly situated question"). We will reverse the district court's fact-

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various circuits, refusing to endorse any particular approach, and reviewing for "abuse of discretion"); *Mooney v. Aramco Servs. Co.,* 54 F.3d 1207, 1213-16 (5th Cir. 1995) (describing it as "remarkable" that a number of courts have failed to formally define "similarly situated," referring to such approaches as "ad hoc," but refusing to adopt any formal definition or set of factors), *overruled on other grounds by Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003).

finding that Plaintiffs are similarly situated only if it is clearly erroneous—not simply because we might have made a different call. *Anderson*, 488 F.3d at 953-54 (citing *McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001)).

B. Two-Stage Procedure for Determining Certification

While not requiring a rigid process for determining similarity, we have sanctioned a two-stage procedure for district courts to effectively manage FLSA collective actions in the pretrial phase. The first step of whether a collective action should be certified is the notice stage. *Anderson*, 488 F.3d at 952-53; *Hipp*, 252 F.3d at 1218. Here, a district court determines whether other similarly situated employees should be notified.

A plaintiff has the burden of showing a "reasonable basis" for his claim that there are other similarly situated employees. *See Anderson*, 488 F.3d at 952; *Grayson*, 79 F.3d at 1097; *Haynes v. Singer Co.*, 696 F.2d 884, 887 (11th Cir. 1983).[39] We have described the standard for

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39. "In *Grayson*, we interpreted the FLSA's collective action provision to require plaintiffs alleging age discrimination to 'demonstrat[e] a reasonable basis for their claim of class-wide discrimination . . . by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which successfully engage defendants' affidavits to the contrary.' " *Anderson*, 488 F.3d at 952. Likewise, in *Haynes*, we stated: "As a preliminary matter, it is not disputed that plaintiffs have the

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determining similarity, at this initial stage, as "not particularly stringent," *Hipp*, 252 F.3d at 1214, "fairly lenient," *id.* at 1218, "flexib[le]," *id.* at 1219, "not heavy," *Grayson*, 79 F.3d at 1097, and "less stringent than that for joinder under Rule 20(a) or for separate trials under 42(b)," *id.* at 1096. In 2007, we recounted our law and noted that at the initial stage, courts apply a "fairly lenient standard." *Anderson*, 488 F.3d at 953; *see Hipp*, 252 F.3d at 1218. The district court's broad discretion at the notice stage is thus constrained, to some extent, by the leniency of the standard for the exercise of that discretion. Nonetheless, there must be more than "only counsel's unsupported assertions that FLSA violations [are] widespread and that additional plaintiffs would come from other stores." *Haynes*, 696 F.2d at 887.

This first step is also referred to as conditional certification since the decision may be reexamined once the case is ready for trial. *Albritton*, 508 F.3d at 1014 (discussing *Hipp*'s first stage as "conditionally certifying the collective action"); *Anderson*, 488 F.3d at 952 (stating district court certified collective action, "but only conditionally," noting the possibility of later decertifying once discovery is substantially over).[40]

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burden of demonstrating a reasonable basis for crediting their assertions that aggrieved individuals existed in the broad class that they proposed." *Haynes*, 696 F.2d at 887.

40. District courts following the two-step *Hipp* approach should treat the initial decision to certify and the decision to (Cont'd)

The second stage is triggered by an employer's motion for decertification. *Anderson*, 488 F.3d at 953. At this point, the district court has a much thicker record than it had at the notice stage, and can therefore make a more informed factual determination of similarity. *Id.* This second stage is less lenient, and the plaintiff bears a heavier burden. *Id.* (citing *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001)).

In *Anderson*, we again refused to draw bright lines in defining similarly, but explained that as more legally significant differences appear amongst the opt-ins, the less likely it is that the group of employees is similarly situated. *Id.* ("Exactly how much less lenient we need not specify, though logically the more material distinctions revealed by the evidence, the more likely the district court is to decertify the collective action."). We also refused to "specify how plaintiffs' burden of demonstrating that a collective action is warranted differs at the second stage." *Id.* Rather, we emphasized the fact that the "ultimate decision rests largely within the district court's discretion," and clarified that in order to overcome the defendant's evidence, a plaintiff must rely on more than just "allegations and affidavits."

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notify potential collective action members as synonymous. Indeed, *Hipp* collapses the two questions by describing the first stage of certification as "the notice stage." *Hipp*, 252 F.3d at 1218. Our circuit precedent on notice is, for the purpose of a *Hipp* analysis, the same as our law on the question of conditional, and initial, certification.

Id. Because the second stage usually occurs just before the end of discovery, or at its close, the district court likely has a more extensive and detailed factual record.

In *Anderson*, we also quoted approvingly of *Thiessen*, where the Tenth Circuit identified a number of factors that courts should consider at the second stage, such as: "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant[s] [that] appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations[.]" *Anderson*, 488 F.3d at 953 (quoting with approval *Thiessen*, 267 F.3d at 1103); *see also Mooney*, 54 F.3d at 1213 n.7, 1215-16. Thus, at the second stage, "although the FLSA does not require potential class members to hold identical positions, the similarities necessary to maintain a collective action under § 216(b) must extend beyond the mere facts of job duties and pay provisions" and encompass the defenses to some extent. *Anderson*, 488 F.3d at 953 (citation and quotation marks omitted). For example, the district court must consider whether the defenses that apply to the opt-in plaintiffs' claims are similar to one another or whether they vary significantly. *Id.* at 954 n.8 (noting that all named plaintiffs were unionized but some opt-in plaintiffs were not, making the collective bargaining agreement defense applicable to some but not all plaintiffs). But ultimately, whether a collective action is appropriate depends largely on the factual question of whether the plaintiff employees are similarly situated to one another.

C. District Court's Denial of Decertification

Turning to this case and applying our circuit precedent, we conclude that Family Dollar has not shown that the district court abused its discretion in denying Family Dollar's motion for decertification.

First, the district court not only properly followed the two-stage procedure for certifying a § 216(b) collective action but also demanded even more evidence than required before certifying the case at the first notice stage. We recounted the procedural background at great length because it readily reveals that the district court proceeded very cautiously and required much more than mere allegations of similarity. The district court denied stage one certification two times, without prejudice, and continued to reexamine its decision as the parties gathered and presented additional evidence. The district court conditionally certified the collective action only after the parties filed the depositions of the named Plaintiffs and multiple affidavits and after making detailed fact-findings that Plaintiffs' jobs were similar.[41]

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41. In some cases, the district court's first-stage certification analysis is properly based on plaintiffs' pleadings and affidavits, *Anderson*, 488 F.3d at 952-53, or on affidavits and deposition transcripts, *Cameron-Grant v. Maxim*, 347 F.3d 1240, 1244 (11th Cir. 2003); *Grayson*, 79 F.3d at 1097. Sometimes only limited information is available at the notice stage and detailed pleadings and affidavits may suffice. We do not hold that the amount of discovery that preceded the first-stage certification here is required but only that the district court had an ample "reasonable basis" to support its 2002 certification order.

Subsequently, after three more years of discovery, the district court relied on a fully developed record when it denied Family Dollar's motion for decertification, and again based its decision on detailed fact-findings. The procedural background shows that the issue of whether these 1,424 Plaintiffs were similarly situated was exhaustively litigated in the district court for over four years. At each step of the process, the district court also applied the correct legal standards under the FLSA for collection actions.

Second, and more importantly, ample evidence supports the district court's fact-findings that the Plaintiff store managers were similarly situated under § 216(b). The district court, at the second stage, had a complete and comprehensive record and found that the opt-in store managers were factually similar in a number of respects including: (1) their universal classification as store managers with the same job duties; (2) the small fraction of time they spent on managerial duties; (3) the large amount of time they spent on non-managerial duties such as stocking shelves, running the cash registers, unloading trucks, and performing janitorial work; (4) the restrictions on their power to manage stores as compared to the district manager's sweeping managerial discretion; (5) the amount of close district manager supervision of store managers; (6) the lack of managerial discretion that Family Dollar corporate policies afforded to store managers; (7) their day-to-day responsibilities; (8) their receiving base salaries regardless of the hours worked and no overtime pay; (9) their sharing certain managerial duties with hourly

employees; (10) their maintaining production and sales records; (11) their inability to authorize pay raises; (12) their power to train subordinates; (13) their restricted authority to close stores in the event of emergencies; and (14) their inability to select outside vendors without district manager approval.[42]

We recognize Family Dollar's assertion that the duties of store managers varied significantly depending on the store's size, sales volume, region, and district. But there was scant evidence to support this argument. Rather, the bulk of evidence demonstrated that the store managers were similarly situated and even Family Dollar perceived no such distinction. Indeed, it exempted all store managers from overtime pay

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42. In its 2002 certification order, the district court found that Plaintiffs could not hire, discipline, or terminate employees without district manager approval. In its 2005 order denying decertification, the court narrowed this to assistant managers, finding store managers could not hire, discipline, or terminate assistant managers without district manager approval. As discussed earlier in section II, store managers were generally not authorized to hire or fire assistant managers without district manager approval, which supports the district court's 2005 finding. The evidence shows, however, that store managers could give verbal and written discipline warnings to all employees, including assistant managers. So although the district court erred in this finding as to discipline, the store managers nonetheless remained similarly situated as to discipline of assistant managers and other employees.

requirements without regard to store size, sales volume, region, district, or hiring and firing authority.[43]

As to the second factor, whether there were defenses individual to each Plaintiff, Family Dollar argues the executive exemption defense is always individualized and fact specific, thereby precluding this collective action. As discussed later, applying the executive exemption is "an inherently fact-based inquiry" that depends on the many details of the particular job duties and actual work performed by the employee seeking overtime pay. *See Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1263 (11th Cir. 2008). But Family Dollar ignores the overwhelming evidence showing that the Plaintiffs, as a group, shared a number of factual details with respect to their job duties and day-to-day work. Just because the inquiry is fact-intensive does not preclude a collective action where plaintiffs share common job traits. Given the volume of evidence showing the store managers were similarly situated, and the fact that Family Dollar applied the executive exemption across-the-board to every store manager—no matter the size, region, or sales volume of the store—Family Dollar has not shown clear error in the district court's finding that its defenses were not so individually tailored to each

43. Although the *Grayson* and *Hipp* plaintiffs worked in several states, this Court concluded that they met the similarly situated requirement. *Grayson*, 79 F.3d at 1091; *Hipp*, 252 F.3d at 1219.

Plaintiff as to make this collective action unwarranted or unmanageable.[44]

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44. Family Dollar relies heavily, both in the district court and on appeal, on charts that summarize the store managers' deposition testimony. Family Dollar argues the charts illustrate that store managers' duties differed substantially. Plaintiffs also submitted charts that summarize the similarity in their duties. These charts were not used at trial—only at the decertification stage.

The parties' respective charts not only conflict as to what the deposition testimony shows, but also fail to paint a full picture. For example, according to Family Dollar's chart, Mary Kimsey had the "authority to hire" (depicted by a "Y" in the "Authority to Hire" column). But Kimsey's deposition shows that she lacked the power to hire assistant managers (although she did have the power to hire sales clerks). The chart suggests that she had the power to discipline subordinates. But according to her deposition, her ability to discipline was contingent on district manager approval. Where Family Dollar's chart indicates that Kimsey "set or adjust[ed] the hours of employees," she actually testified that she had some flexibility to adjust hours, but that she was heavily constrained by the corporate planner and the district manager.

Furthermore, Family Dollar's charts do not include all of the factors, discussed later, that courts examine when making an executive exemption inquiry. Family Dollar's charts mostly addressed a store manager's authority to hire, fire, interview, train, and discipline other employees. But they did not address many other aspects of a store manager's day-to-day duties. In any event, the district court was free to assess the quality of the charts, and there was ample evidence to support the court's fact-findings that the Plaintiffs were similarly situated.

As to the third factor, fairness and procedural considerations, we reject Family Dollar's contention that given the size of the class, the individualized application of the exemption defense, and the court's decision to allow representative testimony at trial, any collective action would be inherently unfair. There is nothing inherently unfair about collectively litigating an affirmative executive-exemption defense where the district court has made well-supported and detailed findings with respect to similarity. Indeed, the more similar the employees, the less likely that collectively litigating the executive-exemption issue can be fundamentally unfair. And to repeat, there was abundant evidence that Plaintiffs' actual jobs were the same, or, at a minimum, substantially similar.[45]

In addition, Plaintiffs' evidence established that Family Dollar uniformly exempted all store managers from overtime pay requirements, and its exemption decision did not turn on any individualized factors. Not one. There is nothing unfair about litigating a single corporate decision in a single collective action, especially where there is robust evidence that store managers

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45. We do not suggest that a collective action needs to have 14 significant job factors in common in order to be, or stay, certified or that less commonality would not have survived a decertification motion. Rather, we highlight the number of similarities only to show that the decertification decision is not close here.

perform uniform, cookie-cutter tasks mandated by a one-size-fits-all corporate manual.[46]

Addressing whether Plaintiffs' claims could be tried fairly as a collective action also requires looking to the purposes of § 216(b) actions under the FLSA: (1) reducing the burden on plaintiffs through the pooling of resources, and (2) efficiently resolving common issues of law and fact that arise from the same illegal conduct. *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989) (noting a collective action affords plaintiffs the "advantage of lower individual costs to vindicate rights by the pooling of resources" and "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact"). We also bear in mind that the FLSA is a remedial statute that should be liberally construed. *Prickett v. DeKalb County*, 349 F.3d 1294, 1296 (11th Cir. 2003) ("FLSA is a remedial statute that has been

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46. Just because a business classifies all employees in a particular job category as exempt does not mean that those employees are necessarily "similarly situated" for purposes of a 29 U.S.C. § 216(b) collective action. Rather, it is necessary to review the actual job duties of those in that job category to determine whether they are similarly situated and whether the exemption defense can be collectively litigated. Here, Family Dollar argues the store's size, sales volume, and location cause store managers' job duties to vary and preclude a collective trial. The facts—that Family Dollar never examined how store managers spent their time and that none of those factors had anything to do with Family Dollar's decision to exempt all store managers from overtime pay—counter Family Dollar's argument in that regard.

construed liberally to apply to the furthest reaches consistent with congressional direction." (quotation marks omitted)). Oddly, the thrust of Family Dollar's fairness argument butts up against the purpose of a collective action—to efficiently resolve a large number of plaintiffs' claims.[47] Therefore, generally speaking, the size of an FLSA collective action does not, on its own, compel the conclusion that a decision to collectively litigate a case is inherently unfair.

Furthermore, Family Dollar's decertification argument is, at root, a claim that the district court's subsequent use of representative testimony during the actual trial was inherently unfair. As discussed later, Family Dollar's representative-testimony assertion—that the district court allowed the jury to decide 1,424 claims based on the testimony of only seven named Plaintiffs—is not supported by the record. In any event,

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47. On appeal, Family Dollar does not contend it was denied a fair opportunity to present its statute of limitations defense. Family Dollar produced detailed records of each of the 1,424 Plaintiffs' employment dates. Since the date on which each Plaintiff joined this lawsuit is a matter of public record, the parties submitted charts showing the amount of back pay owed for each plaintiff for both a two-year and a three-year time period. Thus, once the jury decided the executive exemption issue in Plaintiffs' favor, the jury had the necessary evidence in chart form to limit Plaintiffs' back pay to either two or three years. This underscores how collective actions about overtime pay can be readily and fairly managed. Plus, this is not a case of borderline similarity among the Plaintiffs, but one of heightened similarity, which significantly adds to our fairness conclusion.

we examine the evidence before the court when it heard Family Dollar's motion to decertify. *See Haynes*, 696 F.2d at 887 ("Our review of that decision must be premised upon the evidence that was before the district court at that time."). We are persuaded that, before trial, fairness considerations militated in favor of allowing this overtime-pay action to proceed in a collective forum. Given the substantial similarity of the class members' jobs and uniform corporate treatment of the store managers, it would not serve the interest of judicial economy to require these overtime-pay claims to be adjudicated in 1,424 individual trials. Based on the record in this case, we cannot say the district court abused its discretion in denying Family Dollar's motion for decertification.

IV. EXECUTIVE EXEMPTION DEFENSE

A. FLSA's Executive Exemption

The FLSA requires that employers pay their employees time and a half for hours an employee works in excess of a 40-hour workweek. 29 U.S.C. § 207(a)(1); *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1156 (11th Cir. 2008); *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1314 (11th Cir. 2007). But there are exemptions to this requirement. *Alvarez Perez*, 515 F.3d at 1156. The exemption at issue here, the executive exemption, provides that the FLSA's requirements "shall not apply with respect to . . . any employee employed in a bona fide executive . . . capacity." 29 U.S.C. § 213(a)(1).

Appendix A

The Department of Labor's ("DOL") regulations interpret this defense. Because Plaintiffs' claims span from 1999 until 2005, two sets of DOL regulations apply. The regulations that were in effect prior to August 23, 2004 (the "old regulations") contain a short test that defines the phrase "employee employed in a bona fide executive capacity."[48] 29 C.F.R. § 541.1 (2003) (ellipsis omitted). This short test has three requirements: (1) an employee "is compensated on a salary basis at a rate of not less than $250 per week," (2) his "primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized

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48. The old regulations had a long test and a short test. The long test applied to those who made not less than $155 a week. 29 C.F.R. § 541.1(a)-(f) (2003). The short test, on the other hand, applied to those making not less than $250 a week. 29 C.F.R. § 541.1(f) (2003). The entire test was contained in section (f), and it was therefore "short" in comparison to the longer test contained in § 541.1(a)-(f) (2003). *See Atlanta Prof'l Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 804-05 (11th Cir. 1991).

The current regulations (effective August 23, 2004) abolished the distinction between the long and short tests. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed.Reg. 22,122, 22,122-25 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541) (explaining reasons for the August 23, 2004 change). The Plaintiffs whose claims involve conduct that occurred prior to August 23, 2004 all earned more than $250 a week. Therefore, only the short test under the old regulations and the August 23, 2004 regulations apply to this case.

department or subdivision thereof," and (3) his work "includes the customary and regular direction of the work of two or more other employees." *Id.* (2003); *Rodriguez*, 518 F.3d at 1263; *Brock v. Norman's Country Mkt., Inc.*, 835 F.2d 823, 825 (11th Cir. 1988).[49]

After August 23, 2004, the new regulations apply and add a fourth requirement. To establish an employee is a bona fide executive, an employer must show: (1) the employee is "[c]ompensated on a salary basis at a rate of not less than $455 per week"; (2) the employee's "primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof"; (3) the employee "customarily and regularly directs the work of two or more other employees"; and (4) the employee "has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." 29 C.F.R. § 541.100(a) (2006).[50]

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49. We cite the pre-August 23, 2004 regulations with a 2003 citation and the post-August 23, 2004 ones with a 2006 citation.

50. The new regulations explain the determination of whether an employee's recommendations are given particular weight includes consideration of:

> whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and

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The parties agree that the first element of the executive exemption test—the amount of salary—is met. But they hotly dispute the second element—whether the store managers' primary duty is management. Thus, we examine the second element.

B. Primary Duty Is Management

Both regulations require that the employee's primary duty is management. The old regulations give these examples of managerial tasks:

> Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their

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> recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. . . . An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

29 C.F.R. § 541.105 (2006).

> complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

29 C.F.R. § 541.102(b) (2003).[51] The new regulations are similar and explain that generally, management includes, but is not limited to, the same conduct listed in the old regulations, but adds these examples of managerial tasks: "planning and controlling the budget; and monitoring or implementing legal compliance measures."[52] 29 C.F.R. § 541.102 (2006).

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51. While the new regulations elevate the employee's hiring and firing authority to a fourth, separate requirement, the old regulations likewise considered the selection of employees as a management task under the primary duty inquiry.

52. The new regulations list these management tasks:

> [I]nterviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees'

(Cont'd)

Appendix A

The old and new regulations do not define primary duty. Both indicate the answer to the primary duty question "must be based on all the facts in a particular case." 29 C.F.R. § 541.700(a) (2006); 29 C.F.R. § 541.103 (2003). Both regulations identify factors to consider when determining whether an employee's primary duty is managerial. *See* 29 C.F.R. § 541.700(a) (2006); 29 C.F.R. § 541.103 (2003).

The old regulations list these five factors: (1) "[t]he amount of time spent in the performance of the managerial duties"; (2) "the relative importance of the managerial duties as compared with other types of duties"; (3) "the frequency with which the employee exercises discretionary powers"; (4) "his relative

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> productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102 (2006).

freedom from supervision"; and (5) "the relationship between [the employee's] salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor." 29 C.F.R. § 541.103 (2003); *see also Rodriguez*, 518 F.3d at 1264 (listing factors in § 541.103 to be analyzed in determining whether an employee's primary duty is management). The old regulations explain: "In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty." 29 C.F.R. § 541.103 (2003). The regulations then hedge a bit, and state that "[t]ime alone . . . is not the sole test. . . ." *Id.* (2003). Where the employee does not spend over 50% of his time on management, "he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion." *Id.* (2003).

The new regulations make a stronger effort to define primary duty, stating that "[t]he term 'primary duty' means the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a) (2006). The new regulations also add that this determination is to be made "with the major emphasis on the character of the employee's job as a whole." *Id.* (2006). The new regulations explicitly reference the same factors with one exception. The third factor—"the frequency with which the employee

exercises discretionary powers"—has been deleted.[53] *Compare id.* (2006), *with* 29 C.F.R. § 541.103 (2003).

The new regulations, like the old, expand upon the time-spent-on-exempt-work factor. The new regulations state that this factor "can be a useful guide in determining whether exempt work is the primary duty of an employee" and that "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement." 29 C.F.R. § 541.700(b) (2006). As in the old ones, the new regulations specify that "[t]ime alone, however, is not the sole test" and thus "[e]mployees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." *Id.* (2006).

The new regulations also clarify that "[c]oncurrent performance of exempt and nonexempt work does not

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53. The new regulations list these factors to consider for the primary duty inquiry:

> [T]he relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

29 C.F.R. § 541.700(a) (2006).

disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met." *Id.* § 541.106(a) (2006). In other words, an employee's performance of nonexempt work does not preclude the exemption if the employee's primary duty remains management.[54] Similarly, an employee whose primary duty is to perform nonexempt work does not become exempt merely because she has some responsibility for occasionally directing the work of nonexempt employees.[55] "Whether an employee meets the

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54. The new regulations illustrate the concept of "concurrent duties":

> For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, *but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management.* An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

29 C.F.R. § 541.106(b) (2006) (emphasis added).

55. The new regulations illustrate this proposition through this example:

> [A] relief supervisor or working supervisor *whose primary duty is performing nonexempt work* on the

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requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis" and based on the factors already set forth in § 541.700(a) as to the primary duty question. *Id.* (2006).

We turn to Family Dollar's argument that the primary duty of its store managers is managerial, triggering the FLSA's executive exemption, and that the court erred in denying Family Dollar's motion for judgment as a matter of law.

C. Family Dollar's Motion for Judgment as a Matter of Law

Family Dollar bears the burden of proving its executive exemption affirmative defense. *Alvarez Perez*, 515 F.3d at 1156; *Brock*, 835 F.2d at 826. This Court has recognized the "Supreme Court's admonition that

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> production line in a manufacturing plant *does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when,* for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

29 C.F.R. § 541.106(c) (2006) (emphasis added).

courts closely circumscribe the FLSA's exceptions." *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1364 (11th Cir. 1997). And the exemption "is to be applied only to those clearly and unmistakably within the terms and spirit of the exemption." *Brock*, 835 F.2d at 826 (quotation marks omitted). Therefore, we narrowly construe exemptions to the FLSA overtime requirement. *Alvarez Perez*, 515 F.3d at 1156 (stating "exemptions are to be construed narrowly" (quotation marks omitted)); *Nicholson*, 105 F.3d at 1364.

We have rejected a "categorical approach" to deciding whether an employee is an exempt executive. *Rodriguez*, 518 F.3d at 1264. Instead, we have noted the "necessarily fact-intensive nature of the primary duty inquiry," that "the answer is in the details," and that "[w]here an issue turns on the particular facts and circumstances of a case, it is not unusual for there to be evidence on both sides of the question, with the result hanging in the balance." *Id.* And "[t]he result reached must be left intact if there is evidence from which the decision maker, the jury in this instance, reasonably could have resolved the matter the way it did." *Id.*

Here, the trial evidence was legally sufficient for a reasonable jury to find that Family Dollar failed to meet its burden of proving that its store managers' primary duty was management. Because that evidence is detailed

above, we do not recount it but focus on the factors in the primary duty inquiry.[56]

As to the time-spent-on-exempt-work factor, the overwhelming evidence at trial showed Plaintiff store managers spent 80 to 90% of their time performing nonexempt, manual labor, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms. Conversely, Plaintiff store managers spent only 10 to 20% of their time performing exempt work, a far cry from the DOL's 50% guideline for management tasks. *See* 29 C.F.R. § 541.700(b) (2006); 29 C.F.R. § 541.103 (2003). Family Dollar did not present evidence to the contrary. *See Allen*, 495 F.3d at 1315 ("The employer is in a superior position to know and produce the most probative facts concerning the nature and amount of work performed. . . ."). In fact, Family Dollar executives Barkus and Broome testified that Family Dollar never studied what store managers actually did on a day-to-day basis or the amount of time store managers spent on managerial duties.

We recognize that the amount of time spent performing exempt tasks is not dispositive of the

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56. Family Dollar does not argue that the old and new regulations lead to different results in the primary duty inquiry here. Thus, we need not distinguish between them in our analysis. Although *Rodriguez* was decided under the old regulations, 518 F.3d at 1262 n.2, its focus on the "fact-intensive nature of the primary duty inquiry" is correct under the new regulations too, *see* 29 C.F.R. § 541.700(a) (2006).

primary duty issue. But substantial evidence about the four other factors also supports the jury's verdict here.

As to the relative importance of store managers' managerial duties compared with their nonexempt duties, this factor weighs in favor of the jury's finding that store managers are not exempt executives. Admittedly, the store managers' job description includes managerial duties. But Family Dollar's job description of the store managers' "Essential Job Functions" provides that store managers must do the same work as stock clerks and cashiers. Store managers must work their store's preassigned merchandise delivery day, known as "truck day." Barkus acknowledged that store managers spent their delivery-day time doing manual labor. Rather than treat these manual tasks as an incidental part of a managerial job, Family Dollar describes them as essential. A large amount of manual labor by store managers was a key to Family Dollar's business model given each store's limited payroll budget and the large amount of manual labor that had to be performed. The jury was free to weigh the relative importance of the store managers' managerial and non-managerial duties, but ample evidence supported a finding that the non-managerial tasks not only consumed 90% of a store manager's time but were of equal or greater importance to a store's functioning and success.

The third factor in the old regulations—the frequency with which the employee exercises discretionary powers—

also supports the jury's verdict.[57] There was overwhelming evidence that store managers spent only 10 to 20% of their time on exempt (i.e., managerial) work. Plaintiffs presented evidence that store managers rarely exercised discretion because either the operations manuals or the district managers' directives controlled virtually every aspect of a store's day-to-day operations. The manuals and other corporate directives micro-managed the days and hours of store operations, the number of key sets for each store, who may possess the key sets, entire store layouts, the selection, presentation, and pricing of merchandise, promotions, payroll budgets, and staffing levels. The manuals even instruct store managers on the smallest details, such as how to arrange clip boards, what items go in each of the four drawers of the single file cabinet, and how to remove spots and chewing gum from store mats.

The few decisions not mandated by the manuals and corporate headquarters are vested in the district manager. These decisions include the power to change

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57. As noted above, the new regulations omit this discretionary-power factor, but they retain the freedom-from-supervision factor. Having discretionary power is one aspect of freedom from supervision. In addition, the new regulations specify that the determination of an employee's primary duty includes, but is not limited to, the listed factors and is to be made "with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a) (2006). Thus, the new regulations do not preclude, and are consistent with, our consideration of the frequency with which an employee exercises discretionary powers in our primary duty analysis.

store hours, close for bad weather, approve changes to store layouts, establish all employees' initial rates of pay, approve all pay raises, set payroll budgets, control the total labor hours allocated to each store, approve the hiring and firing of assistant managers, and even approve the use of appliances such as coffee pots. Even when a store manager exercised discretion in scheduling employees for the week, she did so within the strict constraints of mandatory store hours, a limited payroll budget, a prohibition on overtime work by hourly employees, and a staff scheduler. This evidence supports a reasonable jury finding that Family Dollar's store managers had few, and infrequently exercised, discretionary powers.

As to the store managers' relative freedom from supervision, this factor likewise favors Plaintiffs. The evidence showed that district managers (1) supervised 10 to 30 stores, (2) headed the store team, (3) were responsible for enforcing the detailed store operating policies, (4) closely reviewed each store's inventory orders and net sales figures, (5) closely monitored each store's weekly payroll, (6) controlled employee hourly rates and pay raises, (7) routinely sent to-do lists and emails with instructions to store managers, (8) closely supervised the selection, pricing, sales, displays, and ordering of merchandise, and (9) closely supervised every aspect of store operations. Store managers had little freedom from direct supervision. Indeed, ample evidence showed that the combination of sweeping corporate micro-management, close district manager oversight, and fixed payroll budgets left store managers

little choice in how to manage their stores and with the primary duty of performing manual, not managerial, tasks.[58]

As to the last factor—the relationship between the store managers' salary and other wages for nonexempt work—the parties submitted evidence documenting the store managers' average salaries and the assistant managers' average hourly wages from 1999 to 2005. Using a 70-hour workweek, store managers earned, on average, roughly the same (less than a dollar or more per hour) as hourly assistant managers. Using a 60-hour workweek, store managers earned approximately two or three dollars more per hour than hourly assistant managers. The jury was entitled to consider these salary figures, along with the fact that store managers performed nonexempt work 80 to 90% of the time. Given the relatively small difference between the store managers' and assistant managers' hourly rates, it was within the jury's province to conclude that this factor either did not weigh in Family Dollar's favor or at least did not outweigh the other factors in Plaintiffs' favor.

In sum, there was legally sufficient evidence for the jury, after considering all of the evidence and weighing

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58. Although Family Dollar emphasizes its store managers had management-type paperwork to do (such as bank deposits and accident and payroll reports), Family Dollar ignores that how to do each task was prescribed by the manual and district managers and store managers had little discretion, under Plaintiffs' evidence, as to those tasks.

the relevant factors,[59] to have reasonably determined that Family Dollar failed to meet its burden of proving that Plaintiff store managers' primary duty was management.

D. Other Circuits' Cases

Despite these factors, Family Dollar insists its store managers were "in charge" of the store, and therefore, exempt as a matter of law. Family Dollar cites several cases concluding that managers of a free-standing store or restaurant were exempt executives as a matter of law. However, the courts made that decision only after examining the factual details of the employees' duties and actual work. As we stated in *Rodriguez*, such a "particularized approach is consistent with the DOL regulation, which provides that the 'determination of whether an employee has management as his primary duty must be based on all the facts in a particular case.' " 518 F.3d at 1264 (quoting 29 C.F.R. § 541.103 (2002)); *see* 29 C.F.R. § 541.700(a) (2006) (stating the primary duty question "must be based on all the facts in a particular case"); 29 C.F.R. § 541.103 (2003) (same).

In answering the primary duty inquiry, courts do not "simply slap[] on a talismanic phrase." *Rodriguez*, 518 F.3d at 1264. Family Dollar's "in charge" label strikes us as a way to bypass a meaningful application of the fact-intensive factors. As in *Rodriguez*, we reject that "categorical approach." *Id.*

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59. The district court explicitly instructed the jury on these factors.

Moreover, Family Dollar's cases had materially dissimilar facts and did not involve the combination of (1) store managers performing as high a percentage of nonexempt work, (2) the same severe degree of restriction on store managers' discretion by corporate policy, and (3) oversight as strict and involved as district managers' in this case. For starters, none of the circuit cases dealt with store managers that spent 80 to 90% of the time performing manual labor. For example, in *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 499 (6th Cir. 2007), a store manager spent 60% of her time performing non-managerial duties.[60] *See also Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1108-09, 1114 (9th Cir. 2001) (accepting on summary judgment plaintiffs' supported assertion they spent "more than fifty percent of the time" on nonexempt manual tasks but without providing a concrete figure).[61]

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60. Importantly, the Sixth Circuit noted that courts cannot rely solely on whether an employee was "in charge" of the store. *Thomas*, 506 F.3d at 503. Rather, they must evaluate the employee's actual job duties. *Id.* The court did "not adopt a rule that any employee who is in charge of a store has management as her primary duty; [it] merely conclude[d] that other cases stating as much do not conflict with [Sixth Circuit] precedent." *Id.* at 503 n.4. "When a court is asked to consider whether an employee's primary duty consists of management, the proper analytical approach is to scrutinize the factors in the Secretary's regulations, not simply to determine whether the employee was 'in charge.' " *Id.*

61. The *Baldwin* decision also rests on other materially dissimilar facts. *See Baldwin*, 266 F.3d at 1108-09, 1115 (stating

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Family Dollar's cases are also distinguishable in that they give less weight to the plaintiffs' estimates of time spent performing nonexempt work because the plaintiffs in those cases performed exempt and nonexempt work concurrently. *See Thomas*, 506 F.3d at 504; *Donovan v. Burger King Corp.* ("*Burger King I*"), 672 F.2d 221, 226 (1st Cir. 1982); *Baldwin*, 266 F.3d at 1114. The evidence, in the light most favorable to the Plaintiffs here, did not show they performed managerial and non-managerial tasks concurrently. Rather, there was evidence that, by and large, the store managers performed most managerial tasks before the store opened and after it closed. The amount of manual labor overwhelmed their capacity to perform managerial duties concurrently during store hours. Other evidence showed the nature of the manual labor prevented store managers from performing managerial duties concurrently. For example, a store manager unloading a truck and

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plaintiffs "had to adhere to company policies" but describing plaintiffs as "free from daily supervision," noting that supervisor "visited the park once or twice a month, and there was no constant oversight," and that "in practice, the oversight was neither so rigorous nor so frequent as to undermine the undeniable fact that the Baldwins were substantially free from supervision"). Further, the *Baldwin* plaintiffs managed without much interference by their corporate headquarters. *Id.* at 1115 ("They managed the park without much participation or interference from Trailer Inns, Inc.'s Yakima headquarters."). As noted in *Rodriguez*, *Baldwin* "illustrates the necessarily fact-intensive nature of the primary duty inquiry." *Rodriguez*, 518 F.3d at 1264.

stocking the storeroom was not concurrently supervising the cashier out front. The jury may well have given more weight to the Plaintiffs' evidence that they spent 80 to 90% of their time solely on nonexempt work.

Even the retail-chain cases with standardized instructions did not involve fact patterns with the same level of corporate directives or district managers that constrained the powers of the employees-in-question in quite the same way. For example, in *Burger King I*, 672 F.2d at 223, and *Donovan v. Burger King Corp.* ("*Burger King II*"), 675 F.2d 516, 517, 521-22 (2d Cir. 1982), the assistant managers retained discretion over a number of operational decisions, and nothing suggested the Burger King restaurant manager, the position directly above the assistant manager, had oversight powers comparable to the ones exercised by Family Dollar district managers. The Second Circuit described restaurant managers as "available by phone" and "available for advice"—not as overarching remote micro-managers. *See Burger King II*, 675 F.2d at 522. Likewise, in *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 616 (8th Cir. 1991), the court's description of regional-manager control pales in comparison to the rigid directives and supervision that Plaintiffs presented at trial. *Id.* For Family Dollar store managers, there was evidence that showed district managers and corporate headquarters made the vast majority of day-to-day decisions, and store managers had little discretion.

In any event, our affirmance of the jury's verdict here is based on a fact-intensive application of the factors espoused in the regulations, and not on a categorical approach of whether a particular employee is "in charge." More importantly, while there was "evidence on both sides of the question," the "jury[,] in this instance, reasonably could have resolved the matter the way it did." *Rodriguez*, 518 F.3d at 1264. "The issue is not whether the evidence was sufficient for [Family Dollar] to have won, but whether the evidence was sufficient for it to have lost. It was." *Id.* at 1264-65.[62]

E. 163 Individual Plaintiffs Granted Judgment on Executive Exemption Defense

Family Dollar also appeals the district court's decision to grant judgment on the executive exemption defense as a matter of law to 163 of the 1,424 individual Plaintiffs. The court concluded that Family Dollar failed to prove these 163 Plaintiffs satisfied the third part of

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62. Family Dollar stresses that its store managers either hired and fired the hourly employees, or had district managers who frequently followed their hiring and firing recommendations. Hiring and firing authority is now a fourth, separate requirement in the executive exemption test; even if met, Family Dollar still has to establish the store managers' primary duty was management. 29 C.F.R. § 541.100(a) (2006); 29 C.F.R. § 541.1 (2003). While this is certainly a fact the jury could also consider in making that primary duty determination, the jury was required to base its decision on all the facts and was not bound to find the store managers' primary duty was management due to this authority over hourly employees.

the executive exemption test, i.e., that they customarily and regularly directed the work of two or more other employees. 29 C.F.R. § 541.100(a) (2006) (identifying third part of executive exemption test as whether the employee "customarily and regularly directs the work of two or more other employees"); 29 C.F.R. § 541.1 (2003) (requiring that an exempt employee's work "includes the customary and regular direction of the work of two or more other employees"). As we explain below, Family Dollar has shown no reversible error on this issue.

Both regulations provide that customarily and regularly means a frequency that "must be greater than occasional but which, of course, may be less than constant."[63] 29 C.F.R. § 541.701 (2006); 29 C.F.R. § 541.107(b) (2003). The new regulations add that "[t]asks or work performed 'customarily and regularly' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks." 29 C.F.R. § 541.701 (2006).

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63. The old regulations did not define "customary and regular" in the short test for the executive exemption. However, the long test under the old regulations did define the phrase "customarily and regularly," albeit with regard to the long test's separate requirement that an exempt executive "customarily and regularly exercises discretionary powers" in 29 C.F.R. § 541.1(d) (2003). It provided that "customarily and regularly" is "a frequency which must be greater than occasional but which, of course, may be less than constant." 29 C.F.R. § 541.107(b) (2003). Family Dollar cites § 541.107 as a useful definition of "customary and regular."

Both regulations define "two or more other employees" as either two full-time workers or their equivalent. 29 C.F.R. § 541.104(a) (2006); 29 C.F.R. § 541.105(a) (2003). As to equivalency, an employee may supervise one full-time employee and two part-time employees. *See* 29 C.F.R. § 541.105(a) (2003). "For example, if the 'executive' supervises one full-time and two part-time employees of whom one works morning[s] and one, afternoons; or four part-time employees, two of whom work mornings and two afternoons, this requirement would be met." *Id.* The new regulations express the same sentiment. *See* 29 C.F.R. § 541.104(a) (2006) ("One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent."). However, neither set of regulations defines "full-time."

To prove its store managers customarily and regularly directed the work of two or more employees, Family Dollar introduced payroll records and easy-to-digest exhibits summarizing that data. For example, Exhibit 1742C provided data about each of the 1,424 Plaintiffs including (1) their full names, (2) social security numbers, (3) the number of weeks each worked as a store manager (under a row heading entitled "# weeks supervised"), (4) the number of weeks each store manager had two or more full-time hourly employees working in the store, and (5) what percentage of time each store manager had two or more full-time hourly employees. Exhibit 1742C assumed that a full-time employee works 40 hours a week and that full-time

meant 80 hours of employee work per week through any combination of employees.[64]

In applying the requirement that an employee "customarily and regularly directs the work of two or more other employees," the district court examined whether store managers supervised 80 subordinate hours of employee work per week at least 80% of the time. The district court did not require the store managers to be present when hourly employees worked those 80 hours—only that the store employ 80 hours of subordinate employee labor 80% of the time. Using Family Dollar's Exhibit 1742C, the district court granted judgment as a matter of law to 163 salaried Plaintiff store managers whose stores did not meet that requirement.

Family Dollar argues the court should have used Family Dollar's internal definition of full-time as a 30-hour workweek. Although the preamble to the new regulations states that the DOL declines to clarify the meaning of "full-time," it "stands by its current interpretation that an exempt supervisor generally must direct a total of 80 employee-hours of work each week."[65] Defining and Delimiting the Exemptions for

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64. To be clear, Family Dollar also submitted other exhibits. But the others assumed that a full-time employee worked a 30-hour workweek (Exhibit 1742A) or a 35-hour workweek (Exhibit 1742B). The district court used Exhibit 1742C (based on a 40-hour workweek), which is why we focus on that exhibit.

65. The DOL Wage and Hour Division's Field Operations Handbook similarly states that "[t]wo full-time employees or (Cont'd)

Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed.Reg. 22,122, 22,135 (Apr. 23, 2004). The preamble also states that "circumstances might justify lower standards. For example, firms in some industries have standard workweeks of 37 ½ hours or 35 hours for their full-time employees. In such cases, supervision of employees working a total of 70 or 75 hours in a workweek will constitute the equivalent of two full-time employees." *Id.*

Notably, the preamble does not suggest a workweek as short as 30 hours counts as "full-time" under the FLSA, much less 60 labor hours substituting for 80 hours. Further, Family Dollar's brief points to no evidence in the trial record suggesting that the industry standard in its line of retail business is a 30-hour workweek. While there may be instances where a deviation from the 40-hour workweek is appropriate, we cannot say that the district court, based on this record, erred in adopting 80 hours as constituting two full-time employees or their equivalent in this case.

Although Family Dollar also criticizes the 80% threshold, Family Dollar does not argue that the court's

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the equivalent within the meaning of Reg. 541.105(a) is generally considered to mean 80 hours of work by subordinate employees." Field Operations Handbook, § 22c00(b). This Court has noted that the DOL's Field Operations Handbook is persuasive, even though it is not entitled to *Chevron* deference. *Klinedinst v. Swift Invs., Inc.*, 260 F.3d 1251, 1255 (11th Cir. 2001).

effort to quantify the customary-regular requirement as a percentage of time was error or that the customary-regular issue should have gone to the jury. Rather, Family Dollar primarily challenges the district court's last step in the calculation of whether Plaintiffs met the 80% threshold. As we noted above, the district court authorized Family Dollar to count every week that the stores in question had 80 labor hours worked by the hourly employees, and it did not require the store managers to be physically present at the store during those 80 hours for those weeks to count towards the 80% mark.[66] Family Dollar does not challenge that part of the calculation.[67] Nor does it challenge the accuracy of the calculation as to the number of weeks each salaried store manager worked, the number of weeks hourly

66. In fact, Plaintiffs challenged Family Dollar's exhibits in part on the grounds that Family Dollar's calculation of the total employee hours failed to account for whether the store managers were physically present at the store at the same time as their subordinates. In other words, even where store managers were absent, Family Dollar still counted all subordinate labor hours for the purpose of their exhibits on the customary and regular supervision issue. The district court rejected the Plaintiffs' challenge.

Therefore, Family Dollar benefited from every subordinate hour worked—without regard to whether the store managers were physically present or on vacation, out sick, on leave, or just not there.

67. Indeed, at Family Dollar's request, the district court instructed the jury that "[c]ontinuous physical presence is not an essential requirement for supervision."

employees worked, or the percentage of time each individual store manager directed the work of two or more full-time employees or their equivalent. Indeed, the data are from Family Dollar's own Exhibit 1742C. The calculations showed, for example, that 589 stores had 80 labor hours 100% of the time, and 290 more stores had 80 labor hours 90% of the time. But Exhibit 1742C also showed that 163 stores had 80 labor hours less than 80% of the time in their stores (and of those, some were well below 50% and several at 0%).

Family Dollar contends that the court should have used the average percentage of all 1,424 store managers as a group. In other words, its argument is that, on average, store managers (as a group) had 80 labor hours in their stores 93% of the time. Family Dollar arrives at this conclusion by dividing the number of weeks that Plaintiffs supervised two or more employees for 80 hours (61,481) by the total number of weeks that Plaintiffs worked at Family Dollar (66,097). The total percentage: 93%. While averaging the number of weeks that employees meet the criteria may suffice in some collective cases, the court here enjoyed more precise data that showed (1) the percentage for each of the 1,424 store managers individually and (2) that 163 of the Plaintiffs failed to supervise two or more employees 80% of the time. Family Dollar cites no authority, and presents us with no principled basis, for determining that the court's use of this more precise evidence was reversible error.

The parties cite two other circuit court cases addressing this issue. In *Secretary of Labor v. Daylight Dairy Prods., Inc.*, the First Circuit concluded that employees who do not direct work 76% of the time "fall[ ] short" of "regular and customary" supervision of 80 hours of work. 779 F.2d 784, 788 (1st Cir. 1985). Although *Daylight Dairy* failed to decide what precise figure constitutes customary and regular direction, it determined that 76% was insufficient. In the Eighth Circuit's *Murray* decision, the "store managers supervised at least two or more employees who worked eighty hours per week 98.2% of the time." 50 F.3d at 567-68. The Eighth Circuit concluded: "That is 'customarily and regularly' by any definition." *Id.* Although the court expressed its disagreement with *Daylight Dairy, id.* at 568, it similarly failed to define a minimum threshold of precisely what "customary and regular" means.

We likewise do not draw a bright-line rule but examine only whether Family Dollar has shown reversible error in the court's use of Family Dollar's Exhibit 1742C as a basis for granting judgment in favor of the 163 Plaintiff store managers. It has not.

V. REPRESENTATIVE TESTIMONY

Family Dollar's challenge to the use of representative testimony proceeds as follows: Seven Plaintiffs testified. There are 1,424 Plaintiffs. Therefore, the verdict is based on only the representative testimony of less than 1% of the total number of Plaintiffs. Family

Dollar argues that this was simply too small a sample size of testifying Plaintiffs, and therefore the jury verdict is unreliable and should be set aside.

Family Dollar's depiction of the trial is belied by the record. First, Plaintiffs did not use representative testimony to prove its prima facie case. Instead, Plaintiffs relied on Family Dollar's thorough payroll records for each of the 1,424 Plaintiffs to show (1) when each employee worked, (2) how many actual hours they worked, (3) how much they were paid, and (4) that they never received overtime pay. Rather than contesting Plaintiffs' prima facie case,[68] Family Dollar focused on its executive exemption defense at trial.

Second, Family Dollar's claim, stripped of its hyperbole, is reduced to an objection that not enough Plaintiffs testified to ensure a reliable verdict on whether the executive exemption defense applied. But the jury's verdict as to that defense was not based on the testimony of just seven Plaintiffs. Instead, the parties presented an abundance of trial evidence about the executive exemption issue, including (1) a vast array of corporate manuals; (2) testimony from 39 witnesses including Family Dollar executives, district managers who ran the operations of 134 stores, and store

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68. To establish its prima facie case, Plaintiffs demonstrated that: (1) Family Dollar employed them; (2) Family Dollar is an enterprise engaged in interstate commerce covered by the FLSA; (3) each Plaintiff actually worked in excess of a 40-hour workweek; and (4) Family Dollar did not pay any overtime wages to them. *See* 29 U.S.C. § 207(a).

managers who worked at a total of 50 different stores; (3) detailed charts summarizing wages and hours; and (4) a wealth of exhibits including emails, internal Family Dollar correspondence, payroll budgets, and in-store schematics. If one factors in that Broome and Barkus oversaw thousands of stores, the witnesses go from representing hundreds of stores to thousands. In addition to the large quantity of testimonial evidence, the non-testimonial evidence was equally high in quality and largely comprised of Family Dollar's corporate records. The jury's verdict is well-supported not simply by "representative testimony," but rather by a volume of good old-fashioned direct evidence.[69]

Family Dollar's trial conduct is also revealing. It actually opposed the introduction of more witness testimony from Plaintiff store managers. After Family Dollar presented the deposition testimony of 12 opt-in store managers, Plaintiffs attempted to introduce into evidence the deposition testimony of 238 more opt-in

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69. It appears that the district court required the Plaintiffs, as part of their case-in-chief, to put up their rebuttal to Family Dollar's executive exemption defense before Family Dollar itself called any witnesses. Even so, the Plaintiffs presented more evidence as to the executive exemption in their case-in-chief than just the seven testifying Plaintiffs. And in any event, Plaintiffs established their prima facie case, and the executive exemption is Family Dollar's affirmative defense—not a part of Plaintiffs' case-in-chief. Thus, we view the evidence on the executive exemption defense as a whole.

store managers. But Family Dollar objected,[70] and the

70. MR. ST. CLAIR [for Family Dollar]: We had our extracts, Your Honor. They offered and testified the balance of those depositions. We're now talking about something completely different, depositions for which we haven't offered anything into evidence.

MR. JOHNSON [for Plaintiffs]: That goes to balance.

MR. ST. CLAIR: If it was just a party, it would be like I take my own deposition and put it in at trial. We can't do that. I might also add—

MR. R. WIGGINS [for Plaintiffs]: They wanted to take 250 depositions, Your Honor, of the collective group. You allowed them to take 250. They now have offered, I'm told, twelve. And we're offering the other, I guess, 238.

THE COURT: And you're offering them for the truth of the matter asserted?

MR. R. WIGGINS: Yes, as sworn testimony under the rules. Yes.

MR. JOHNSON: Yes.

THE COURT: And you—and you've not sought a stipulation as to what these witnesses would say, if called?

MR. R. WIGGINS: During the earlier part of the case, Judge, we could not come to an agreement about stipulations on that.

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district court sustained the objection.[71] Family Dollar cannot validly complain about the number of testifying plaintiffs when it successfully objected to Plaintiffs' attempt to present the testimony of almost 20 times as many Plaintiff store managers. Although Family Dollar itself had the opportunity to present a great deal more testimony from Plaintiff store managers, or its own

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> MR. ST. CLAIR: Your Honor, this is the first time that I've heard anything about them offering depositions in this case from people who were not called as witnesses. This is the very first time that issue has been raised, Your Honor.
>
> MR. R. WIGGINS: It's not true, and it's mainly because he just entered the case recently, Your Honor. These are on our exhibit list. These—and there's nothing surprising about it. We've argued this before, it's just not—it's no surprise to them. We've always said, if you offer part of 250, we're going to offer the other part.
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> MR. ST. CLAIR: And, Your Honor, I'm told, at the pretrial conference said they will not be admitted into evidence. I wasn't at the pretrial conference, but my partner was.
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> THE COURT: Well, Plaintiffs' Exhibit 297 as offered by the plaintiff is not received in evidence, but it will be a part of the record. Any other evidence from either party?

71. Although Plaintiffs' offer of the deposition testimony was not received in evidence, the court ruled that it would "be a part of the record."

district managers, it chose not to. Indeed, Family Dollar used only 10 of its allotted 40 hours for its defense, even though it bore the burden of proving the executive exemption defense.[72]

This leads us to a third flaw in Family Dollar's argument. Plaintiffs did not shoulder the burden of proof on the executive exemption defense. Family Dollar did. *See Atlanta Prof'l Firefighters Union*, 920 F.2d at 804. Thus, Family Dollar cannot rely on an insufficient number of witnesses being called by the Plaintiffs to meet Family Dollar's burden of proof on its own affirmative defense.

Fourth, Family Dollar relies on two FLSA decisions involving representative testimony, but they do not help Family Dollar. *See Reich v. S. Md. Hosp., Inc.*, 43 F.3d 949, 951-52 (4th Cir. 1995); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792-96 (1st Cir. 1991). Since these cases are part of a line of circuit cases dating back to *Anderson v. Mount Clemens Pottery*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946),[73] a few words about *Mt. Clemens* are in order first.

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72. Family Dollar's cross-examination of Plaintiffs' witnesses did not count against its 40 hours unless its cross-examination time exceeded that of Plaintiffs' direct-examination. There is no indication in the briefs that Family Dollar's cross-examination reduced any of its 40 hours.

73. Congress abrogated a portion of the *Mt. Clemens* opinion not relevant here with the passage of the Portal-to-Portal Act, Pub.L. No. 49-52, 61 Stat. 87 (1947). *See* 29 U.S.C. § 251; *United States v. Cook*, 795 F.2d 987, 990-91 (Fed.Cir. 1986).

Appendix A

In *Mt. Clemens,* the Supreme Court authorized a burden-shifting scheme designed to facilitate the ability of plaintiffs to prove an FLSA violation where the employer failed to maintain proper records (such as how many hours its employees worked and the amount of pay). *Id.* at 686-88, 66 S.Ct. at 1192. To prevent workers from being penalized by the employer's failure to keep adequate records, the Supreme Court provided that plaintiffs could meet their burden of proof so long as they "prove[ ] that [they have] in fact performed work for which [they were] improperly compensated" and "produce [ ] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687, 66 S.Ct. at 1192. Although *Mt. Clemens* never used the term "representative testimony," subsequent courts have interpreted it to authorize some employees to testify about the number of hours they worked and how much they were paid so that other non-testifying plaintiffs could show the same thing by inference. *See, e.g., Reich,* 43 F.3d at 951 ("Under *Mt. Clemens,* the Secretary can present testimony from representative employees as part of his proof of the prima facie case."); *Donovan,* 780 F.2d at 1116 ("There is no requirement that to establish a *Mt. Clemens* pattern or practice, testimony must refer to all nontestifying employees. Such a requirement would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens.*"); *DeSisto,* 929 F.2d at 792 (interpreting *Mt. Clemens* burden-shifting and noting that the plaintiff "can rely on testimony and evidence from representative employees to meet the initial burden of

proof requirement"); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) ("We hold that the *Mt. Clemens Pottery* standard allows district courts to award back wages under the FLSA to non-testifying employees based upon the fairly representative testimony of other employees.").

As a result, most of the circuit cases addressing how many FLSA plaintiffs need to testify before their testimony can be considered representative of the group involve an employer's failure to keep adequate records and the plaintiffs' use of the *Mt. Clemens* burden-shifting scheme. *See, e.g., McLaughlin*, 850 F.2d at 589; *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115-16 (4th Cir. 1985), *disapproved of on other grounds, McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988); *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973). Family Dollar relies on two of these kinds of cases to support its argument that, statistically, not enough plaintiffs testified here. *See Reich*, 43 F.3d at 951-52 (reversing district court because testimony from 58 employees was insufficient to represent 3,368 employees); *DeSisto*, 929 F.2d at 792-96 (reversing district court for allowing one employee to represent 244 employees at trial).

This line of cases does not help Family Dollar. Here, Family Dollar adequately maintained its records. Indeed, Plaintiffs relied on those records extensively. Therefore, the *Mt. Clemens* burden-shifting analysis does not apply. Furthermore, the question in these burden-shifting

cases is whether the plaintiffs showed the amount and extent of the work performed as a matter of just and reasonable inference. In such a context, it makes sense to examine whether there is, statistically speaking, enough evidence to support the inference, and to shift the burden of proof on an element of the plaintiffs' case (the number of hours worked) to the employer. *See DeSisto*, 929 F.2d at 794 ("The evidence was simply inadequate to give rise to a 'just and reasonable inference' as to the amount and extent of undercompensated work."). Where employer payroll records are inadequate, litigants can only approximate the number of hours worked and the amount of pay due. In such cases, the answer requires a numerical estimate of hours and pay.

In contrast, the Plaintiffs here relied on Family Dollar's extensive payroll records that broke down, week-by-week, how many hours each of the 1,424 store managers worked. *Reich* and *DeSisto* are nothing like this case. Here, there was no need for such numerical approximation.

If anything, the *Mt. Clemens* line of cases affirms the general rule that not all employees have to testify to prove overtime violations. *See DeSisto*, 929 F.2d at 793 (indicating that, generally speaking, employees who perform "substantially similar work" may testify on behalf of their counterparts); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 63 (2d Cir. 1997) (stating "there is no bright line formulation that mandates reversal when the sample is below a percentage

threshold. It is axiomatic that the weight to be accorded evidence is a function not of quantity but of quality."); *see also Brock v. Norman's Country Mkt., Inc.*, 835 F.2d 823, 828 (11th Cir. 1988) ("[I]t is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of 'just and reasonable inference.' ") (quoting *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982)).[74]

We reject Family Dollar's argument that the executive exemption defense is so individualized that the testifying Plaintiffs did not fairly represent the non-testifying Plaintiffs. For the same reasons that the court did not err in determining that the Plaintiffs were similarly situated enough to maintain a collective action, it did not err in determining that the Plaintiffs were similarly situated enough to testify as representatives of one another.

In any event, the only issue we must squarely decide is whether there was legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict. There was.

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74. Even in non-*Mt. Clemens*-type cases, courts have authorized representative testimony in FLSA cases. *See, e.g., Burger King I*, 672 F.2d at 225 (authorizing district court to rely on representative testimony in FLSA case to prevent cumulative testimony); *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989).

VI. WILLFULNESS AND LIQUIDATED DAMAGES

Family Dollar also appeals (1) the sufficiency of the evidence to support the jury's finding that Family Dollar willfully violated the FLSA, a decision that extended the statute of limitations from two to three years, and (2) the court's reliance on the jury's willfulness finding in determining that Family Dollar did not act in good faith, a decision that triggered the liquidated damages award.

A. Willful Violation

The statute of limitations for a claim seeking unpaid overtime wages under the FLSA is generally two years. 29 U.S.C. § 255(a). But if the claim is one "arising out of a willful violation," the statute of limitations is extended to three years. *Id.*

"To establish that the violation of the [FLSA] was willful in order to extend the limitations period, the employee must prove by a preponderance of the evidence that his employer either knew that its conduct was prohibited by the statute or showed reckless disregard about whether it was." *Alvarez Perez*, 515 F.3d at 1162-63 (citing *McLaughlin*, 486 U.S. at 133, 108 S.Ct. at 1681). Federal regulations define "reckless disregard" as the " 'failure to make adequate inquiry into whether conduct is in compliance with the [FLSA].' " *Id.* at 1163 (quoting 5 C.F.R. § 551.104).

Family Dollar raises several challenges to the jury's willfulness finding. All fail. First, the evidence, detailed above, was legally sufficient to support the jury's finding that Family Dollar's FLSA violations were willful. For example, the Plaintiffs presented testimony from Family Dollar executives that it never studied whether the store managers were exempt executives. Executives also testified that Family Dollar's company-wide policy was that store managers were exempt from FLSA overtime requirements, but they had no idea who made that policy. Further, given the evidence at trial, the jury reasonably could have found that Family Dollar executives knew that store managers spent most of their time performing manual, not managerial, tasks, that corporate manuals micro-managed store managers' performance of those tasks, that the 380 district managers closely supervised their store managers, and that store managers had little discretion or freedom from supervision.

Second, we reject Family Dollar's suggestion that the complex and fact-intensive nature of the executive exemption inquiry means that, as a matter of law, the FLSA violations were not willful. Such a rationale would effectively preclude a willfulness finding in cases involving an executive exemption affirmative defense. While the jury could have well considered that factor in its willfulness determination, complexity alone does not preclude a willfulness finding.

Third, we reject Family Dollar's argument that the court's decision to grant judgment as a matter of law for 163 Plaintiffs somehow biased the jury in its

willfulness determination. This speculation has no support in the record. One could just as easily speculate in the other direction—the judgment for the 163 Plaintiffs meant the court thought the other 1,261 Plaintiffs failed to prove their case. Furthermore, the record shows the court instructed the jury that it still had to decide whether Family Dollar acted willfully and to determine damages for the 163 Plaintiffs. The court also instructed the jury to determine whether Family Dollar met its burden of proof on the executive exemption for the remaining Plaintiffs and, if so, to determine willfulness and damages.

Finally, Family Dollar has not shown the district court abused its discretion[75] in excluding various exhibits.[76] Based on our review of the record, the district court carefully considered whether to admit these exhibits and made specific findings and rulings under Federal Rule of Evidence 403. During the first trial in

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75. We review a district court's rulings on the admissibility of evidence for abuse of discretion and will reverse only if the moving party establishes a substantial prejudicial effect. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1276 (11th Cir. 2008).

76. Family Dollar focuses mainly on these exhibits: (1) a district court decision (Exhibit 1955) and a magistrate judge decision (Exhibit 1954), both finding that a store manager was exempt from the FLSA's requirements; (2) correspondence to and from DOL Wage and Hour investigators (Exhibits 2249 and 2336) and state investigators (Exhibits 2356, 2357, and 2249); and (3) a report from two psychologists.

2005, the district court found that the vast bulk of this evidence was irrelevant. The district court also made a Rule 403 determination that even if there was some probative value in the evidence (although it emphasized that there was not), any such value was substantially outweighed by the other Rule 403 considerations.[77] In the second trial, the district court relied on these factual determinations and evidentiary rulings from the first trial.

Family Dollar's brief cites and describes the relevant exhibits. However, it fails to discuss Rule 403, to engage the court's reason for excluding these exhibits, or to explain why the court's particular findings and rulings were an abuse of its discretion. *See Flanigan's Enters., Inc. v. Fulton County,* 242 F.3d 976, 987 n.16 (11th Cir. 2001) (stating that argument was waived because the appellants "fail[ed] to elaborate or provide any citation of authority in support of" the argument in their brief). Family Dollar simply asserts that the court "excluded Family Dollar's evidence from the jury." In addition, Family Dollar fails to respond to the Plaintiffs' arguments that many of these exhibits were unauthenticated, and that no evidence showed that Family Dollar's decision-makers ever saw, or relied on, any of the documents when deciding to exempt the store

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77. Federal Rule of Evidence 403 authorizes district courts to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

managers. Viewing the record as a whole and bearing in mind the court's wide discretion in evidentiary rulings, Family Dollar has not carried its burden to show that the court abused its discretion or that the jury's willfulness determination was based on reversible error.

B. Good Faith and Liquidated Damages

When the jury finds an employer has violated the FLSA and assesses compensatory damages, the district court generally must add an award of liquidated damages in an equal amount. 29 U.S.C. § 216(b) ("Any employer who violates the provisions of . . . section 207 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages."); *Alvarez Perez*, 515 F.3d at 1163. However, the district court has discretion to reduce or deny liquidated damages " 'if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA].' "[78] *Alvarez Perez*, 515 F.3d at 1163 (quoting 29 U.S.C. § 260).

"[T]he judge and jury answer what is essentially the same question for two different purposes. The

78. "The employer bears the burden of establishing both the subjective and objective components of that good faith defense against liquidated damages." *Alvarez Perez*, 515 F.3d at 1163; *Dybach v. State of Fla. Dep't of Corr.*, 942 F.2d 1562, 1566-67 (11th Cir. 1991).

willfulness or good faith question is answered first by the jury to determine the period of limitations and then, if there is a verdict for the employee, again by the judge to determine whether to award liquidated damages." *Id.* at 1162.

Here, the district court determined that Family Dollar failed to meet its burden of proving good faith on the liquidated damages issue because the jury already had found willfulness on the statute of limitations issue. Family Dollar argues that the district court erred because judges have the discretion to decide good faith regardless of the jury's willfulness finding.

While this was an open question in our circuit in 2006—the time of the second trial—our subsequent decision in *Alvarez Perez* forecloses Family Dollar's argument. In *Alvarez Perez,* we concluded that "in an FLSA case a jury's finding in deciding the limitations period question that the employer acted willfully precludes the court from finding that the employer acted in good faith when it decides the liquidated damages question."[79] 515 F.3d at 1166. Thus, under

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79. In *Alvarez Perez,* we explained this conclusion, in part, this way:

> [W]hen a jury finds that a defendant's violation is willful for statute of limitations purposes, it has already factored the possibility of good faith into its examination. . . . Not only would a district court impermissively be making a finding contrary to the

(Cont'd)

Alvarez Perez, the district court did not err in concluding that the jury's finding of willfulness precluded a good faith finding. *Id.* at 1165-66. Accordingly, the district court did not err in awarding Plaintiffs $17,788,029.32 in liquidated damages, representing an amount equal to the back pay award.[80]

VII. JURY INSTRUCTIONS

Family Dollar's last claim involves the district court's jury instructions. We start with our standard of review. Although "[w]e review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the party who objects to them," *United States v. Campa*, 529 F.3d 980, 992 (11th Cir. 2008) (citing *United States v. Grigsby*, 111 F.3d 806, 814 (11th

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(Cont'd)

> jury's findings, but . . . to find "good faith" after a finding of "willful" violation is illogical; the two terms are now mutually exclusive.

Alvarez Perez, 515 F.3d at 1165 (quotation marks omitted).

80. This Court recognized in *Alvarez Perez* that, in light of its holding, "evidence that an employer acted without willfulness and in good faith makes a difference at this stage only if that evidence compels judgment as a matter of law for the employer." *Id.* at 1167. Based on the Plaintiffs' evidence discussed above in the analysis of the jury's willfulness finding, we cannot say that Family Dollar's evidence compelled judgment as a matter of the law in its favor on willfulness and, in turn, on good faith.

Cir. 1997)), the standard is "deferential," *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th Cir. 1996). As long as the instructions accurately reflect the law, the district court is afforded "wide discretion as to the style and wording employed in the instructions." *Bateman*, 79 F.3d at 1543 (quotation marks omitted); *Campa*, 529 F.3d at 992; *Bogle v. McClure*, 332 F.3d 1347, 1356 (11th Cir. 2003).

Our practice is not to nitpick the instructions for minor defects. "[I]f the jury charge as a whole correctly instructs the jury, even if it is technically imperfect, no reversible error has been committed." *Bateman*, 79 F.3d at 1543. "[W]e examine the challenged instructions as part of the entire charge, in view of the allegations of the complaint, the evidence presented, and the arguments of counsel, to determine whether the jury was misled and whether the jury understood the issues." *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1413 (11th Cir. 1986) (citation and quotation marks omitted). "When the instructions, taken together, properly express the law applicable to the case, there is no error even though an isolated clause may be inaccurate, ambiguous, incomplete or otherwise subject to criticism." *Somer v. Johnson*, 704 F.2d 1473, 1477-78 (11th Cir. 1983) (quoting *Johnson v. Bryant*, 671 F.2d 1276, 1280 (11th Cir. 1982)); *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1050 (11th Cir. 1989). We reverse where we are "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Somer*, 704 F.2d at 1478 (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981)); *Johnson*, 671 F.2d at 1280.

After review of the jury charge as a whole and counsels' entire closing arguments, we are convinced that the jury properly understood the issues and applicable law. Family Dollar has shown no reversible error in the charge.

First, Family Dollar challenges the district court's jury instruction on willfulness. However, the district court used the Eleventh Circuit Pattern Jury Instruction 1.7.1 that in order to prove willfulness, Plaintiffs must establish that Family Dollar knew, or showed reckless disregard for, the fact that its conduct was forbidden by the FLSA. The charge is consistent with our case law outlined earlier. *See Alvarez Perez*, 515 F.3d at 1162-63. The district court's decision not to elaborate further was within its discretion.

Second, Family Dollar challenges a part of the executive exemption charge. Family Dollar cannot and does not quarrel with the vast majority of the charge. That is because the court issued lengthy and comprehensive instructions on the executive exemption issue that fully captured the applicable regulations and factors. For example, the court instructed the jury that Family Dollar had to prove that: Plaintiffs made over $250 a week, their primary duties were management, and they customarily and regularly directed the work of two or more employees or their equivalent. With respect to the primary duty element, the court stated that primary duty means the main, major, or most important duty performed by the employee, and that in determining whether an employee's duties are his or

her primary duty, the jury should consider all of the facts surrounding the employment.

The court also instructed that the "rule of thumb" is that primary duty means that the major part, or more than 50% of the employee's time, was spent in performing executive duties. But it clarified that time alone is not the only factor in determining whether the employee's duties were primarily managerial and that an employee's primary duty may be executive even if the employee spends less than half of his or her time in such work.

In addition, the court told the jury to consider these primary duty factors: (1) the relative importance of executive duties compared with non-executive duties, (2) the frequency with which the store managers exercised discretionary powers, (3) their relative freedom from supervision, and (4) the relationship between store managers' salaries and wages paid to other employees for nonexempt work.[81]

Importantly for this case, the court also issued a concurrent duties instruction stating: "An executive employee may sometimes perform non-exempt or non-managerial duties concurrent with his executive duties, so long as the non-exempt duties are not his primary

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81. *See* 29 C.F.R. § 541.700(a) (2006); 29 C.F.R. § 541.103 (2003).

duties."[82] Family Dollar requested this charge. In its closing argument, Family Dollar then used the concurrent duties charge to stress that store managers who performed nonexempt tasks (stocking shelves, cleaning the store, etc.) alongside their subordinates do not lose their exempt status since the store managers' primary duty was to manage the store.

Family Dollar's principal complaint on appeal is that the court should not have added this part: "A working or supervising foreman works alongside his or her subordinates performing the same kind of work as the subordinates, and carrying out supervisory functions" and "are not executives within the meaning of the law."

Family Dollar correctly points out that there is a regulation entitled "working foremen," *see* 29 C.F.R. § 541.115 (2003), and that its stated purpose is to clarify one aspect of the long test.[83] But Family Dollar argues that this means the court's working or supervising

82. The court also defined exempt and nonexempt work, and emphasized that continuous physical presence at a store is not an essential requirement for determining whether an employee supervised two or more employees. The court instructed that "job title alone" is not enough to determine whether an employee is exempt, but rather that the jury must examine "the employee's salary and actual job duties." The court also instructed that work that is directly and closely related to executive work is considered executive work, even if it includes routine menial tasks.

83. *See supra* note 48.

foreman instruction does not apply in a short test case. And, therefore, the court should not have used the instruction at all. *See Hays v. Pauls Valley*, 74 F.3d 1002, 1008 (10th Cir. 1996) (noting that the "working foreman" provision "does not apply to the short test"). *But see Shockley v. City of Newport News*, 997 F.2d 18, 26 (4th Cir. 1993) (noting that even when the short test applies, "[t]he 'working foreman' concept is useful because it helps to distinguish between a manager of a recognized subdivision and a mere supervisor of subordinate employees"). Plaintiffs respond that the short test-long test distinction was abolished in 2004, and that the concurrent duties regulation references a "working supervisor." *See* 29 C.F.R. § 541.106(c) (2006) (contrasting role of working supervisor to exempt executive). Further, Plaintiffs argue that even if the working foreman regulation does not technically apply, the working or supervising foreman concept still provides a helpful example of how to apply the exemption defense. Plaintiffs point out that even we have referenced the concept of a working foreman to express ideas embodied in the short test. *See Brock*, 835 F.2d at 826.

Although the parties hotly dispute whether the working foreman regulation applies, there is no need to resolve that thorny question in order to determine whether this particular jury charge was error here. In order for Family Dollar to prevail, it must do more than show that the working or supervising foreman charge was technically inapplicable. It must demonstrate that the charge, combined with all of the other instructions

on the executive exemption issue, undermined the jury's ability to correctly understand the applicable law and resolve the executive exemption issue. In the vernacular of our precedents, it must either mislead the jury or leave us with a "substantial and ineradicable doubt" as to whether the court properly instructed the jury.

Family Dollar has not made this showing. Family Dollar overstates the significance of the working or supervising foreman charge. The charge relates to only a narrow slice of the executive exemption issue-how to deal with supervisors who work alongside of, and do the same work as, other employees. At root, it is designed to illustrate that an employee who performs the same nonexempt, manual tasks as his co-workers is not an executive even though he is technically a supervisor. Even assuming that concept is inapplicable here—a proposition that we by no means concede—the concurrent duties instruction cures any potential confusion from the working or supervising foreman charge. The concurrent duties instruction makes clear that one can still be an exempt executive even though he performs a plethora of nonexempt duties at the same time as exempt duties. Indeed, the court also accurately told the jury that a store manager may be exempt even though he spends more of his time on nonexempt duties provided that his primary duty is management.

After reviewing the charge as a whole and the closing arguments, we are convinced that the jury was fully and accurately advised that an exempt executive may do exempt and nonexempt work concurrently so

long as his primary duty is managerial. Although it may have been better for the court to have avoided using the working foreman charge, Family Dollar has shown no reversible error here.

VIII. CONCLUSION

For all of the above reasons, we affirm the district court's judgments.

AFFIRMED.

APPENDIX B — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION FILED APRIL 16, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

Civil Action Number
7:01-cv-0303-UWC

JANICE E. MORGAN and BARBARA RICHARDSON, on behalf of themselves and all other similarly situated,

Plaintiffs,

vs.

FAMILY DOLLAR STORES, INC.,

Defendant.

AMENDED FINAL JUDGMENT

The Defendant's Renewed Motion For Judgment as a Matter of Law, Motion for a New Trial, and Motion to Alter or Amend the Judgment, (Doc. 654), and any other pending motion, separately and severally, are hereby DENIED.[1]

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1. The reasons for the Court's denial of the referenced motion are adequately set forth in the Plaintiffs' Opposition to Defendant's Renewed Motion, (Doc. 667), incorporated herein by reference as if fully set forth.

Appendix B

The Final Judgment entered herein on March 31, 2006, is hereby SUPPLEMENTED by the additional amount of $1,164,040.42 as overtime backpay and an additional $1,164,040.42 as liquidated damages.[2]

Thus, the remaining Plaintiffs and the Trustees for the bankruptcy estates of the designated bankrupt Plaintiffs shall have and recover of the Defendant Family Dollar Stores the sum of **$17,788,029.74** as overtime backpay and the additional amount of **$17,788,029.74** as liquidated damages.

The costs of this action are taxed against the Defendant.

Done the 16th day of April, 2007.

s/ U.W. Clemon
U.W. Clemon
United States District Judge

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2. The supplemental amount represents backpay for unpaid overtime due to the bankrupt Plaintiffs listed in Exhibit A to the Notice of Substitution and Joinder, (Doc. 693), except with respect to Donald Bell, Joseph Allen Henry, Lynna R. Lehmkuhl, Sherry L. McCoy, Amber Sue Nelson, and Margaret Jo Rogers. (*See* Doc. 694, Family Dollar's Motion to Strike or Alternatively Opposition and Response to Notice of Substitution and Joinder at Ex. 2.)

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION FILED MARCH 31, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

Civil Action Number
7:01-cv-0303-UWC

JANICE MORGAN, BARBARA RICHARDSON, CORA CANNON, and LAURIE R. TROUT-WILSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

FAMILY DOLLAR STORES,

Defendant.

FINAL JUDGMENT

Based on the Special Verdict of the Jury, and the dismissal of the claims of those Plaintiffs who are barred by the doctrine of judicial estoppel or a lack of standing,[1]

1. Within ten days, any Bankruptcy Trustee may petition the Court by a Motion to Alter or Amend the Judgment to be substituted in the place of a Plaintiff who has been dismissed on grounds of judicial estoppel or for want of standing.

the remaining Plaintiffs shall have and recover of the Defendant the sum of Sixteen Million Six Hundred twenty-three Thousand Nine Hundred Eighty-nine and 32/100 Dollars **($16,623,989.32)**.

Based on the Jury's finding of wilfulness and the Court's finding that the Defendant did not carry its burden of proof of good faith in violating the overtime provisions of the Fair Labor Standards Act, liquidated damages in the amount of Sixteen Million Six Hundred twenty-three Thousand Nine Hundred Eighty-nine and 32/100 Dollars **($16,623,989.32)** are also awarded to the Plaintiffs.

The costs of this action are hereby assessed against the Defendant.

Done the 31st day of March, 2006.

s/ U.W. Clemon
U.W. Clemon
Chief United States District Judge

APPENDIX D — MEMORANDUM OPINION ON MOTION TO DECERTIFY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION FILED JANUARY 13, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

Civil Action Number
7:01-cv-0303-UWC

JANICE MORGAN and BARBARA RICHARDSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

FAMILY DOLLAR STORES, INC.,

Defendant.

MEMORANDUM OPINION ON MOTION TO DECERTIFY

Appendix D

In the first stage of this action under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"),[1] the Court certified it as a collective action. (R., Doc. 62.) The Court certified the class based on the similarities between the working conditions of the named and opt-in Plaintiffs at the Defendant Family Dollar Stores,

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1. The FLSA requires that covered employees be paid at one-and-a-half times their regular hourly rate for hours worked in excess of forty hours per week. *See* 29 U.S.C. §207 (a) (1) (1998). Exempted from this requirement is "any employee employed in a bona fide executive . . . capacity . . . ." 29 U.S.C. § 213 (a) (1) (1998). The current "executive employee exemption" is defined by the Secretary of Labor as covering an employee who meets the following criteria:

> (a) " . . . is compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;"
>
> (b) whose "primary duty is management of the enterprise in which the employee is employed," or of a customarily recognized subdivision of the employer's enterprise;
>
> (c) "customarily and regularly directs the work of two or more other employees;" and
>
> (d) "has the authority to hire or fire other employees" or whose recommendations as to hiring, firing, and promoting of other employees are "given particular weight."

29 C.F.R. § 541.100 (2005).

Inc. ("Family Dollar"). Having completed discovery, Family Dollar has now moved to decertify the class at this second stage of the proceedings.

The relevant factors to be considered at the decertification stage are as follows: 1) similarities in the employment setting and factual situation, 2) the existence *vel non* of defenses individual to each plaintiff, and 3) fairness and procedural considerations. *Brooks v. BellSouth Telecommunications*, 164 F.R.D. 561, 568 (N.D. Ala. 1995) (citing factors set out in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 359 (D.N.J. 1988)), *aff'd without opinion*, 114 F.3d 1202 (11th Cir. 1997); *Bradford v. Bed, Bath & Beyond, Inc.*, 184 F. Supp. 2d 1342, 1346 (N.D. Ga. 2002); *Stone v. First Union Corp.*, 203 F.R.D. 532, 543 (S.D. Fla. 2001).

For the reasons that follow, the decertification motion is due to be denied.

I. Similarities in the Employment Setting and Factual Situation

The facts found in the Court's November 7, 2002, Memorandum Opinion have not been called into question by the subsequent discovery. They are incorporated herein by reference. *(See* R., Doc. 61.)

Family Dollar now operates more than 5,200 retail discount stores in forty-one (41) states and the District of Columbia. Family Dollar sells a variety of products, ranging from groceries to household furnishings and

automotive supplies. For the 2002 fiscal year, annual store sales for individual stores varied from $210,000 to over $4.1 million.

Family Dollar's retail operations are divided into divisions, regions, districts, and stores. Family Dollar has five (5) divisions, and each is headed by a vice president. Each division is further divided into multiple regions. Family Dollar has a total of nineteen regions and each is headed by a regional vice president. Each region is further divided into multiple districts, which are supervised by district managers. Family Dollar has approximately 300 districts, and each district contains multiple stores.

Each store is staffed with a salaried store manager, at least one hourly-paid assistant manager, and at least two hourly-paid clerks. Weekly salaries for store managers range from $400 to over $1,100, plus an additional performance bonus.

The evidence confirms that substantial similarities exist in the job duties of the named and opt-in Plaintiffs. According to Family Dollar, most (90%) of the named and opt-in Plaintiffs interview and train new employees. (*See* R., Doc. 255, Quarles Aff. at Ex. 2,3.) Most of them direct the work of the employees in their stores, and maintain production and sales records. (*See id.*) Further, two out of three (67%) opt-in Plaintiffs supervise fewer than two employees who worked eighty hours per week. (*See id.*)

The evidence also reveals similarities in the managerial duties for which the named and opt-in Plaintiffs were not responsible. Although classified as store managers, all of the named and opt-in Plaintiffs lack independent authority to hire, promote, discipline, or terminate assistant managers. (R., Doc., 294, Pl.'s Br. at Exs. B, P.) Additionally, they all lack the authority to grant pay raises to employees. (*Id.*) Nor are the named and opt-in Plaintiffs authorized to change the weekly schedules of the hourly employees in their stores; rather, these schedules are set by the corporate office. (*Id.*) Moreover, most of the named and opt-in Plaintiffs are not empowered, in emergencies, to close the stores without the approval of their district manager. (*Id.*)

Thus, none of the named and opt-in Plaintiffs are responsible for the total operation of their stores. Much of the management discretion which would ordinarily be exercised by store managers is exercised by the district management pursuant to corporate policies and practices set at headquarters. The store managers are very closely supervised by the district managers. In terms of managerial duties, the district manager is more directly responsible for the operation of a Family Dollar store than the store manager.

In addition to the above, similarities also exist as to how the Plaintiffs spend their time between managerial and non-managerial duties. Most of the named and opt-in Plaintiffs spend only a small fraction of their time

performing managerial duties.[2] They spend the vast majority of their time on essentially non-managerial duties such as unloading trucks, stocking shelves, working as cashiers, and performing janitorial duties. (*See* R., Doc. 294, Pl.'s Br. at Exs. B, C, D, E.) Even some of their managerial functions are shared with non-exempt, hourly employees. (R., Doc. 294, Pl.'s Br. at Ex. E.) These shared functions include ordering merchandise, controlling the keys to the store, opening and closing the store, making bank deposits, approving checks, refunds, and returns. (R., Doc. 294, Pl.'s Br. at Ex. C.) Viewed as a whole, the primary duty of the named and opt-in Plaintiffs is non-managerial. The relative time the Plaintiffs spend in performing non-managerial duties does not significantly differ from store to store, district to district, or region to region. Likewise, the relative importance of the non-managerial duties over the limited number of managerial duties for which the named and opt-in Plaintiffs were responsible, did not vary significantly according to store, region, or district.

As with their managerial and non-managerial duties, the basic pay rates of the named and opt-in Plaintiffs are also similar. For example, Family Dollar pays all of its store managers a base salary regardless of the weekly hours they work. (R., Doc. 250, Def.'s Br. at p. 10.)

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2. Of course, the time spent in performing managerial duties is not alone determinative of exempt status. *Donovan v. Burger King Corp.*, 672 F.2d 221, 225-26 (1st Cir. 1982); *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1144-45 (3d Cir. 1984); *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 331 (5th Cir. 2000).

Appendix D

II. Individualized Defenses

The differential in pay rates of store managers is not problematic in this collective action. Should a violation of the FLSA be established, the backpay due each store manager can be determined by using a formula to derive the expected hourly rate for each store manager based on their annual salary. The calculation of hourly rates may be accomplished by expert evidence.

The statute of limitations defense is likewise not a bar to the treatment of this case as a collective action. The date on which each opt-in plaintiff joined this action is a matter of public record on file in this Court; the date on which they commenced and/or terminated employment with Family Dollar is easily ascertainable.

Family Dollar's defenses to this action are not sufficiently individually tailored to each plaintiff such that a collective action is unmanageable.

III. Fairness and Procedural Considerations

Because of the substantial similarities of their job duties, and because of Family Dollar's company-wide policies and procedures relating to its store managers, the plaintiffs may rely on representative testimony to establish liability and obtain relief, if such is warranted under the FLSA. This scenario is similar to that in the trial of certified class actions under Rule 23 (b) (3), where the testimony and evidence put forth by class

representatives binds the unnamed class members. *See* Fed. R. Civ. Proc. 23 (c) (3) (providing that judgments in class actions maintained pursuant to Rule 23 (b) (3) shall apply to those who received notice, did not opt out of the class, and whom the court finds to be members of the class); 7B Charles Alan Wright et al., *Federal Practice and Procedure* §§1786, 1789 (2d ed. 1986).

Thus, notions of due process and fairness are not offended by a collective trial in these circumstances. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

For these reasons, Family Dollar's Motion to Decertify will be DENIED by separate order.

Done this 12th day of January, 2005.

s/ U.W. Clemon
U.W. Clemon
Chief United States District Judge

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION FILED NOVEMBER 7, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

CIVIL ACTION NUMBER: 01-C-0303-W

JANICE MORGAN, BARBARA RICHARDSON, CORA CANNON, and LAURA R. TROUT-WILSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

FAMILY DOLLAR STORES, INC.,

Defendant.

MEMORANDUM OPINION

Before this Court is Plaintiffs' Renewed Motion to Facilitate Nationwide Notice (Document 47). For the reasons elaborated herein, this Court will GRANT Plaintiffs' Renewed Motion to Facilitate Nationwide Notice.

Appendix E

STATEMENT OF FACTS

Plaintiffs filed this lawsuit on behalf of themselves and all others similarly situated against Defendant Family Dollar Stores, pursuant to Section 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* (Plaintiffs' Third Amended Complaint.) This action is brought to recover unpaid overtime compensation allegedly owed to Plaintiffs. (*Id.* at ¶ 11.) Plaintiffs contend that they and other similarly situated managerial employees were required to perform both managerial and non-managerial duties without receiving overtime compensation. (*Id.* at ¶ 19.) Plaintiffs assert that, for at least three years prior to the filing of this Complaint, Defendant has had a uniform policy and practice of consistently requiring its alleged "managerial" employees to work sixty to ninety hours per week for a salaried amount without overtime compensation. (*Id.* at ¶ 11.) The seven named Plaintiffs are or were employed by Defendant in positions titled "manager." However, the managerial duties of the named Plaintiffs' were minimal as compared to other job duties they regularly performed. (*Id.*) Plaintiffs contend that they performed managerial duties for only approximately five to ten hours per week. (*Id.*) The remainder of their time is or was spent performing non-managerial functions including, but not limited to, operating the cash registers, stocking merchandise, and performing various janitorial duties. (*Id.*) Even though these employees have stated that they worked between twenty and fifty hours per week in excess of the required forty hours, and the vast majority of their hours worked

were spent performing non-managerial job functions, the employees did not receive any overtime compensation. (*Id.*)

The named plaintiffs, and all similarly situated employees who elect to participate in this action, seek unpaid overtime compensation, prejudgment interest on award of back-pay, an equal amount of liquidated damages, attorney's fees, and costs pursuant to 29 U.S.C. § 216(b). (*Id.*)

DISCUSSION

Plaintiffs' counsel first filed a Motion to Facilitate Notice to all class members on April 26, 2001. (Document 13.) Defendant's counsel objected to that motion on the following three grounds: (a) Plaintiffs' motion was premature because the parties agreed to an initial period of preliminary discovery; (b) Plaintiffs failed to satisfy the requirements for opt-in notice under Section 216(b) of the FLSA; and (c) Plaintiffs' proposed notice to class members was deficient and erroneous. (Plaintiffs' Renewed Motion to Facilitate Notice, at p. 2; Documents 31, 34.) This Court denied that motion without prejudice on May 7, 2001. (Document 20.)

Plaintiffs' counsel filed a Renewed Motion to Facilitate Notice on October 18, 2001. (Document 31.) This Court rendered Plaintiffs' renewed motion moot on April 22, 2002. (Document 40.)

Appendix E

Plaintiffs' counsel filed the currently pending Renewed Motion to Facilitate Nationwide Class Notice on October 3, 2002. (Document 47.) The motion requests permission to send notice to all former and current Store Managers who work and/or worked for the Defendant over the last three years. (Plaintiffs' Motion to Facilitate Nationwide Class Notice at ¶ 13.) Likewise, Plaintiffs' counsel requests a computer generated list of potential opt-ins (including the individuals' names, last known address, Social Security number, and store location(s) where they worked) within two weeks of the entry of an Order granting this motion. (*Id.*)

Following more than twenty months of litigation, there are seven named Plaintiffs in this lawsuit. (Document 38.) Plaintiffs' counsel proposes facilitating nationwide class notice to all current and former Store Managers employed in Family Dollar Stores' approximately 4,545 stores in operation located in 40 states. (Wiggins Aff. at ¶ 1.) Plaintiffs' counsel estimates that there are approximately 11,164 current and/or former Store Managers who have not been notified of the pending litigation. (Plaintiffs' Renewed Motion to Facilitate Nationwide Class Notice at ¶ 6.)

The pre-requisite to Section 216(b) notice is that the Plaintiffs meet an evidentiary burden consisting of two primary factors. At a minimum, Plaintiffs must show that: (1) there are other employees who desire to opt-in; and (2) these other employees are similarly situated (to the named Plaintiffs) with respect to their job requirements and pay provisions. *Dybach v. State of*

Florida Department of Corrections, 942 F.2d 1562, 1567-68 (11th Cir. 1991). The *Dybach* Court noted that "[i]f the district court concludes that there are such other employees, we leave it to the district court to establish the specific procedures to be followed with respect to such possible 'opting-in.'" *Id.* at 1568.

After deposing the seven original plaintiffs and opt-ins in the case at bar, counsel for the parties jointly agreed to send notice of the pending lawsuit to current and former Store Managers in the regions where the seven plaintiffs worked from July 1, 1999 until the present. (Plaintiffs' Renewed Motion to Facilitate Nationwide Class Notice at ¶ 3.) On July 24, 2002, 784 notices were sent to former and current Store Managers who worked in these three corporate regions. (*Id.*) Of the 784 notices mailed, approximately 85 of these notices were returned due to incomplete or inaccurate addresses. (*Id.*)

As of October 3, 2002, 142 Consent to Join forms have been filed with this Court from individuals who worked and/or currently live in ten states. (Wiggins Aff. at ¶ 3.) Plaintiffs' counsel contends that this satisfies the "numerosity" requirement stated in *Dybach*. Additionally, Plaintiffs' counsel states that they have received approximately forty telephone calls from individuals who: (1) have indicated their desire to join the lawsuit and are in the process of filing their Consent to Join forms; and/or (2) did not receive notice of the lawsuit, but, by way of "word of mouth" notice of the

lawsuit, have indicated a desire to join. (Plaintiffs' Renewed Motion to Facilitate Nationwide Class Notice at ¶ 4.)

Of the 142 individuals who have already filed Consent to Join forms, there are several similarities among the members of the group, including: (a) the opt-ins were or are required to work sixty to eighty hours per week; (b) they are paid a fixed, weekly salary; (c) they spend approximately 75-90% of their time performing non-managerial duties such as operating the cash register, stocking shelves, unloading trucks, and performing janitorial duties; (d) they are required to report to work before the store is open for business and are required to remain at the store after the store is closed; (e) they do not always supervise two or more employees; (f) they cannot hire, discipline, and/or terminate employees without first obtaining permission from their supervisor; (g) they cannot select outside vendors for the store without obtaining permission from their supervisors; and (h) the store managers have been denied time off from their jobs and threatened with loss of pay if, in fact, they do not work a minimum of forty-eight hours per week. (*Id.* at ¶ 8; responses from questionnaires, Document 57.) Plaintiffs' counsel asserts that these similarities among the opt-ins and the named Plaintiffs satisfy the "similarly situated" requirement from *Dybach*.

Plaintiffs' currently pending motion to facilitate nationwide class notice is their third such attempt. To date, there are seven named Plaintiffs in this suit.

Counsel for the parties jointly decided that those seven plaintiffs were sufficiently similarly situated so as to justify the mailing of notices to 784 former and/or current Store Managers in three of Defendant's corporate regions. Of the 699 notices that were not returned for faulty address, this Court has already received 142 Consent to Join forms. The 142 opt-ins represent slightly more than a 20% response rate from the pool of notices sent in July. Plaintiffs' counsel has filed under seal with this Court copies of questionnaires received from opt-ins in Mississippi, Alabama, Georgia, and New York demonstrating multiple similarities found among the opt-ins received to date. Based on the information received to date, this Court finds that the Plaintiffs have satisfied the numerosity requirement for nationwide class notice. Similarly, this Court finds that the facilitation of nationwide class notice to more than 11,000 potential class opt-ins would not result in this case becoming "literally unmanageable," as Defendant's counsel has asserted.

Likewise, while this Court acknowledges that there exist some differences between the named Plaintiffs and the opt-ins in terms of pay scale and job duties, these differences do not preclude the facilitation of nationwide service. After all, the requirement in *Dybach* is that Plaintiffs be *similarly situated*; *Dybach* does not require that they be identically situated. Furthermore, simply noting that stores have different locations, are of various sizes, and sell different volumes of merchandise does not conclusively indicate that the job responsibilities and salaries of Store Managers are not

similar. Once again, the applicable standard is "similarly situated" — not identically situated — and it is a matter within the sound discretion of the trial court to determine whether the standard has been satisfied. This Court finds that Plaintiffs have satisfied this standard.

CONCLUSION

Based on these findings, this Court concludes that Plaintiffs have satisfied the numerosity and "similarly situated" requirements to justify facilitation of nationwide notice. Accordingly, this Court GRANTS Plaintiffs' Renewed Motion to Facilitate Nationwide Class Service by separate order.

DONE this 7th day of November, 2002.

s/ U.W. Clemon
Chief United States District District Judge
U.W. Clemon

APPENDIX F — PERTINENT FLSA REGULATIONS

29 C.F.R. § 541.1 (2003). Executive

The term *employee employed in a bona fide executive * * * capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in

paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

Appendix F

29 C.F.R. § 541.102 (2003). Management

(a) In the usual situation the determination of whether a particular kind of work is exempt or nonexempt in nature is not difficult. In the vast majority of cases the bona fide executive employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption.

(b) For example, it is generally clear that work such as the following is exempt work when it is performed by an employee in the management of his department or the supervision of the employees under him: Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

Appendix F

29 C.F.R. § 541.103 (2003). Primary duty

A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles

customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programmers and who performs the more complex or responsible jobs in programming will be considered to have management as his primary duty.

29 C.F.R. § 541.100 (2006). General rule for executive employees

(a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and

recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase "salary basis" is defined at § 541.602; "board, lodging or other facilities" is defined at § 541.606; "primary duty" is defined at § 541.700; and "customarily and regularly" is defined at § 541.701.

29 C.F.R. § 541.102 (2006). Management

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Appendix F

29 C.F.R. § 541.105 (2006). Particular weight

To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

29 C.F.R. § 541.106 (2006). Concurrent duties

(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in § 541.700. Generally, exempt executives make the decision regarding when

to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

(c) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the

employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

29 C.F.R. § 541.700 (2006). Primary duty

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their

time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

APPENDIX G – LIST OF ALL NAMED AND OPT-IN PLAINTIFFS AND NOW RESPONDENTS

Alfred Abbitt
Janie Martinez Abbl
Najah M. Abdullah
Maria G. Acosta
Victor M. Acosta
Bernice E. Adams
Don E. Adams
Judy G. Adcock
Kym M. Adler
Scott A. Agee
Ricky R. Aggison
Patricia Aguirre
Cathy R. Albritton
Michelle J. Aldridge
Jeana M. Alessandra
Angela Faye Alexander
Elizabeth A. Alexander
Linda N. Alexander
Abdul R. Allen
Debbie Sperduto Allen
Krista M. Allen
Renee K. Allen
Thomas W. Allen
Ramon E. Allende
Gloria Allison
Antoine Alston
Catherine Elaine Alston
Anna Gayle Alvey
Marilyn R. Amico
Randall E. Amos
Roseann M. Andersen
Barbara D. Anderson
Brenda l Anderson
Carolyn A. Anderson
Cynthia J. Anderson
David D. Anderson
Glen R. Anderson
Jacquelyn Anderson
Keya L. Anderson
Nita R. Andrews
Cynthia K. Angle
Javier O. Arcila
Rueben R. Arellano
Ester Argullin
Joe l Arrellin
Ralph M. Arter
Nellie M. Ashburn
Kathleen M. Ashby
Forest Asher
Cheryl L. Ashry
Tracey D. Atchison
Charles M. Atchley
Angela J. Atkins
Arlene L. Atkins
Mike Atma
Harvey W. Attaway
Jean Atteberry
Petra C. Avitia
Darla L. Babcock
April L. Backlin
Cheryl J. Backus
Bass Brendann Bailey

Appendix G

Nina S. Bailey
Vicky Y. Bailey
Deona J. Baisden
Samantha M. Baker
Shirley I. Baker
Verna L. Baker
Melissa A. Balicki
Karen S. Ball
Mary E. Ball
Misty J. Ball
Tawana L. Balthrop
Patricia L. Banasiak
Carolyn A. Bane
Johnny L. Banner
Raymie Baptist
Alexander Barakh
Suzette Marie Barbe
Delores W. Barber
Mary C. Barentine
Karen Rena Barfield
Stephen W. Barnard
Charles Barnes
Lillian Barnes
William T. Barnett
Delia Barrera
Leota M. Bartoli
Kenneth R. Baumeister
Garry N. Beam
Ingrid R. Beasley
Scott M. Beatty
Cathy L. Becker
Rhonda Beckwith-Grindstaff
Patricia Ann Beers
Camile R. Bell
Donald W. Bell
Ruth A. Bell
Veronica G. Bell
Charles D. Bennett
Carolyn A. Benton
Thomas H. Benzenhafer
Eleanor E. B.erk
Preciliana B. Bernal
Porfirio J. Berrios
Abuwi Beyah
Monty J. Beyer
Misty S. Bice
Jonathan B. Bichkoff
Robert Joseph Bilski
Cheryl Bingaman
Donnelda C. Bingham
Patrica A. Bitner
Angelina Blackburn
Cherie A. Blackman
Torey R. Blackman
Margaret R. Blackwell
Rhonda A. Blackwell
Rita K. Blair
Julie S. Blakeney
Cathy Lynn Blanchard
Carla D. Blankenship
Judy K Bloss
Julie M. Bly
Wilma E Bobbitt
Demetria M. Bolden

Appendix G

Joni S. Bolden
Brenda K. Boleware
Diana L. Bollich
Michelle L. Bolster
Avis N. Boren
Constance M. Bowden
Doreen Bowers
Keith A. Bowman
Karen M. Boyce
Yolanda F. Boynton
Jamel H. Bracey
Katherine B. Bracey
Beverly Brackson
Jennifer M. Braden
Janet L. Bradley
Jennie L. Bradley
Teresa C. Bradshaw
Ruby N. Brady
Reginald B. Brandon
Sallie E. Brandt
Connie A. Brayboy
Diane M. Bremer
Tyrus R. Bremer
John J. Brendel
Robert Brenon
Greg K. Brewer
Nikki L. Brewer
Sonya A. Brewer
Daniel J. Bringle
Connie Y. Briscoe
James Michael Britt
Lesa Brock
Marie A. Brockway
Willard P. Brooks
Jerome D. Broussard
Alfonso Brown
Arlise F. Brown
Betty A. Brown
Deborah S. Brown
Joseph P. Brown
Judy B. Brown
Justin E. Brown
Lawana F. Brown
Lona M. Brown
Lorraine S. Brown
Michael E. Brown
Michael J. Brown
Paula Schiavi- Brown
Shellah E. Brown
Thomas W. Brown
Janet Browne
Dianne B. Brown-Owens
Wandra Bruins
Clide T. Bruner
Keith A. Brunner
Lori A. Bryan
Dwayne K. Bryant
Mary C. Buelin
Rebecca F. Burch
Anthony Burke
Linda M. Burke
Lisa A. Burke
Tamara M. Burns
Jeanette G. Burpoe

Appendix G

Sally Bustillos
Glen John Butka
Jr. Earl Butler
Kathy A. Butler
Melanie G. Butler
Sarah N. Butler
Sharon Lynn Butler
Chester Cabebe
Donald C. Cadman
Tomelita B. Caffey
Pamela D. Cagle
Lisa M. Cairns
Marie Andreil Calais
Rebecca J. Calcione
Arturzillo G. Caldwell
Charles D. Campbell
Cora Cannon
Geraldine A. Cannon
Jeanette Cannon
Rosa Linda Canoba
Kathleen G. Cardillo
Linda Carlson
Beverly R. Carpenter
Ken J. Carpenter
Dale I. Carr
Josue N. Carrera
Sylvia C. Carrillo
Melissa A. Carter
Norman V. Carter
Robert J. Carter
Steven T. Carter
Tamarla T. Carter
Jackie S. Cartrette
Baccuhus H. Carver
Fleta M. Casey
Virginia G. Caskey
Stephen R. Castille
Lynn A. Cauwenbergh
Heathar L. Cecere
Nancy J. Cernansky
Amantha P. Chandler
Gloria S. Charles
Wagner Charles
Maxima Chavarria
Joe O. Cheadle
Josh L. Cheek
Susan M. Chelski
Linsley A Cherisier
Yvette T. Chester
Emry D. Chesterfield
Terry L. Chewning
Regina G. Childress
Donna A. Christoff
Chester L. Clark
Latossia B. Clark
Robert L. Clayton
Wayne J. Clemens
Kenneth E. Cline
Vickie L. Clutter
Delia C. Cly
James W. Cobb
Lisa P. Coelho
Louis C. Coffee
Tamie S. Coggins

Appendix G

Lloyd D. Cohen
Douglas Neil Cole
Judith C. Coleman
Alva A. Coles
Shawn N. Colvin
Betty L. Combs
Diane R. Conaway
Melanie N. Conkle
Judith A. Conley
Thomas P. Conmy
Wanda L. Connell
Nancy A. Connelly
Daniel A. Conner
Sandra L. Conner
Clarice Conway
Shelby J. Cook
Kathy G. Cooke
Patti m Cooke
Beatrice M. Cooks-Smith
Bettina L. Copeland
Michelle L. Cordeiro
Tammy R. Cornish
Efrain Ramos Correa
Daniel J. Correira
Judy A. Corrow
Candace J. Corsaro
Teresa R. Corwin
Vicki l Cotton
Louis E. Couch
Richie H. Cousin
Mary L. Covington
Mary R. Cox
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Carol L. Wilkesmore
Melvin P. Wilkins
Howard L. Wilkinson
Bonnie S. Williams
Carolyn Y. Williams
Debbie D. Williams
Grayling Williams
Jacqueline Williams
Joyce E. Williams
Kernan C. Williams
Kimmerly Williams
Lucretia M. Williams
Michael Williams
Michele A. Williams
Ralph K. Williams
Shonndrika S. Williams
Virginia M. Williams
Theresa Veronica Wilmot
Carla I. Wilson
Cindy Ann Wilson
Clara P. Wilson
Gail E. Wilson
Gloria Wilson
Laura K. Wilson
Patricia F. Wilson
Lyn M. Winget
Terry L. Wint
Paula Y. Winters
Bobbie J. Wisenburg
Edward Witherspoon
Valerie L. Wolf
Tricia I. Womack
Rhonda M. Womble
Chris C. Wood
Colleen R. Wood
Jackie L. Wood
Allan Woods
Alonzo R. Woods
Brenda C. Woods
Marcel Woods
Randy D. Woods
Anna Wooten
Brenda J. Worden
Brenda A. Workman
Walter W. Worth

Appendix G

Jerry D. Worthington
Antionette Wright
Casie L. Wright
James L. Wright
Lloyd A. Wyman
Annette Yates
Karen E. Yates
Nancy L. Yingling
Shirley A. Young
Andy L. Yzaguirre
Deborah L. Zajac
Evangelina Zamarripa
Julia Zamora
Cindy M. Zimbrich
Helen A. Zimmerman
Sonja E. Zimmerman
Georgia L. Zombro
Carol A. Zupancic

SUPPLEMENTAL APPENDIX

4-15-09

Supreme Court, U.S.
FILED

(7)

08 1287 APR 15 2009

144

No. 08- 1287

OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

ROBERT A. LONG
COVINGTON & BURLING LLP
1201 Pennsylvania Ave.
Washington, D.C. 20004
(202) 662-6000

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200 Clinton Avenue West
Suite 900
Huntsville, AL 35801
(256) 517-5198

Attorneys for Petitioner

221685

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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SUPREME COURT, U.S.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

FILED
04 MAY 12 PM 4:15
U.S. DISTRICT COURT
N.D. OF ALABAMA

JANICE MORGAN, BARBARA RICHARDSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	**CIVIL ACTION NO.**
v.	)	**CV-01-C-0303-W**
FAMILY DOLLAR STORES, INC.,	)	
Defendant.	)	

AFFIDAVIT OF JOY QUARLES

STATE OF ALABAMA)
:
JEFFERSON COUNTY)

Personally appeared before me, a Notary Public in and for said County and State, Joy Quarles, who being known to me, and first duly sworn, deposes and says:

1. My name is Joy Quarles. I am over the age of 19 and otherwise competent to give this affidavit. This affidavit is based upon my personal knowledge, the plaintiffs' depositions in this action, and information provided to me by the various attorneys at my firm who represent Family Dollar in this case and who took the depositions of the plaintiffs in this case.

2. I am employed as Legal Secretary at Bradley Arant Rose & White in Birmingham, Alabama.

3. I created the three attached Exhibits. Exhibit 1 is a chart entitled "Frequency of District Managers' (DM) Visits;" Exhibit 2 is a chart of "Management Duties (29 C.F.R. Sec.541.102)" which lists alphabetically the opt-in plaintiffs deposed and either a "Y" or "N" in some or all of the blocks following the name of the plaintiff; Exhibit 3 bears the same title as Exhibit 2 but instead of a "Y" or "N" in the following blocks, Exhibit 3 has numbers which correspond to page numbers in the respective plaintiff's deposition transcript (see below).

4. The printed information in Exhibits 1, 2, and 3 was entered into those exhibits by me by typing into each exhibit information that had been recorded on separate charts created for each respective plaintiff by the Family Dollar attorney who read and reviewed the testimony of that plaintiff in his/her deposition and then recorded the information listed. Thus, I was given by the respective attorneys involved in reviewing the plaintiffs' depositions separate charts for each individual plaintiff. I transcribed the information for each plaintiff received into the corresponding summary charts for all plaintiffs attached as Exhibits 1, 2, and 3. I then proofread the summaries I had created by comparing each plaintiff's information on the summary to the handwritten individual charts that had been given to me by each attorney and corrected any errors I found. I was instructed by Matt Miller, one of the attorneys involved, to leave a block empty on the summary sheet of Exhibit 2 if the handwritten individual sheet contained no information, had both a "Y" (or "yes") and an "N" (or "no"), or had "not applicable" or "N.A."

5. Further affiant sayeth not.

SA-2

Joy Quarles

STATE OF ALABAMA)
:
JEFFERSON COUNTY)

I, the undersigned, a notary public in and for said county in said state, hereby certify that Joy Quarles, whose name is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, she executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 11th day of May, 2004.

Notary Public

[NOTARIAL SEAL] My commission expires: 2/4/07

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the above and foregoing Affidavit of Joy Quarles on:

Gregory O. Wiggins
Wiggins, Childs, Quinn & Pantazis
The Kress building
301 19th Street North
Birmingham, AL 35203

by delivering a copy of same to him on this 12th day of May, 2004.

James L. May
OF COUNSEL

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
1.	Adams, Bernice	Nick Hutton (51)							Steve Shaw (52-54)	
2.	Alexander, Angela Faye		Larry Grady – 3 times per month (45) Robin – three times per month (44-45)		Shane Little (45)					
3.	Allen, Krista	Donald Pickering (30)	David Allen (30) Bob (30)							
4.	Allende, Ramon	Neal Peterson (108)	Jim Jertson (87) Bob (30)							
5.	Alston, Catherine			Kelley Lee (38)	Bob Eckens (38)					
6.	Anderson, Brenda		Dick Gray (92)		Denise Dunlap (77)				Rick (?) (84-85)	
7.	Anderson, Carolyn		Dorothy Hopkins (59-61)						Randy Simones (58-59)	
8.	Arrellin, Joe		(31)							

S-2-S

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
9.	Attaway, Harvey			Jerry Phillips Wichita Falls, TX Store (27)	Jerry Phillips Graham, TX Store (27)					
10.	Avitia, Petra C	Mike Newman (38-39)			Ruben Rodriguez (38)					
11.	Backus, Cheryl									(40-41)
12.	Baker, Shirley		Pat – Columbus, GA (71)		Franklin, GA (46)					
13.	Barbe, Suzette		Chris Blackburn Sheila Black Chris Bowling Rich Smith (54-55, 125-26, 128)							
14.	Barber, Delores W.		Rick Savage (42-43) Bill Smith (45)		Larry Grady (46)				Shane Little (49)	
15.	Barrentine-Hurley, Mary			(158)						

SA-7

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
16.	Beam, Garry		Mike Roessleu Paul Alley (44)		Steve Prumty Daryl Wickert (45)					
17.	Beasley, Ingrid		(68-69)							
18	Bennett, Charles	John Ford Bob Lnu (33)								
19.	Berrios, Porfirio J.	Monty Ferguson twice a week (22-23)	Don Phillips (20-21)		Christina Vanderbilt (21)					
20.	Bice, Misty S				Linda (243)					
21	Blakeney, Julie			Gary Bailey (64)					Jill Mayo (64)	
22	Bloss, Judy Kay				Jerry Stinson					
23	Bly, Julie			Wendy Evans (63)						

SA-8

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
24	Bracey, Katherine B. Durham, NC	Joe Kowalizh (53)								
25	Brady, Ruby	Joann Palmer (24)								
26	Brenner, Tyrus		Russ Lanzafame Dave Haberkorn (118)							
27	Brown, Judy B.								Ed Revea (18) Genserner (19) Hollis & Terry Bryant (20)	
28	Brown, Shellah E								Linda Taylor (66)	
29	Brown, Tom	(131, 195)								
30	Browne, Janet		(42-43)							

SA-9

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
31.	Brown-Owens, Dianne	Ed Rueve – weekly or monthly (62)								
32.	Burke, Linda St. Petersburg, FL			Jennifer Beem (58)		Sandra Fowler (59)				
33.	Butler, Earl E. (Jr.)				Kevin Hogland (145)					
34.	Butler, Melanie G.						Geiger (39) Not that often – less than once a month			
35.	Butler, Sharon	Jerry Phillips (118) Vicki Christensen (83)								
36.	Caffey, Tomelita B Montgomery, AL[1]									
37.	Cannon, Cora H				John Gensmore (80)					

SA-10

[1] Worked only 1 month as SM and claim should be barred by 3 year SOL.

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
38.	Cannon, Geraldine				Lynn Bazinetta (78)					
39.	Carrera, Josue	John For (47) Alonza Salazar (48) Beatrice Gabino (50-51)								
40.	Carter, Norman V.	(177)								
41.	Carter, Robert J	John Gossemer (67)								
42.	Casey, Fleta		Sheila Wallur (66)		Calvin Watts (61-62)					
43.	Charles, Gloria S.		John Gensmore (78)							
44.	Chavarria, Maxima	Fidel Ramos (64)	Amy Garcia (64-65)							
45.	Cheadle, Joe O				Bob Akins (39-40)					

SA-11

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
46.	Clark, Latossia B.	Daily – store was base store								
47.	Conaway, Diane									(67)
48.	Cooks-Smith, Beatrice M.		(73)		(73)					
49.	Correira, Daniel J.		Anthony Ventura (26) V.Valletta later on (25)		V.Valletta – initially (25) Steve Grant (27) Dennis Donovan (28) Diane Duty (28)	John Cabana (28)				
50.	Corsaro, Candace				(30, 34)					
51.	Cousin, Richie H. Houston, MS	Mike Watson (79)								
52.	Cruz, Enrique		Charles Packer (37) Every 2-3 weeks							

SA-12

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
53.	Cruz, Pansy R.									
54.	Cutchall, Wilma				Willard Green – Once every 4-8 weeks (44, 79) Donna Jordance -- Every 4 to 6 weeks (80)					
55.	Dalton-Goss, Janet									(99)
56	Davis, Lloyd	Richard Hodge (63)								Richard Hodge (63)
57	Day, Richard	3 or 4 a month (122)								
58	Detter, Bill	(177)								
59	Dickerson, Angela	Kevin Kerns (56)								
60	Dinolfo, Carol				Palmer (112)		sometimes only every six weeks (112)			

SA-13

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
61	Dixon, Rebecca	Dan Allen (53-54)			Mike Dixon (53-54) Dave Morgan (54)				Paul Wright (53-54)	
62	Dones, Mareo				Every 4-6 weeks (63)					
63	Duessler, Alice	(29-30) would not estimate								
64	Dunning, Denise Georgetown, SC	Carol Mauldin (72)								
65	DuPont, Sandra Kay		(50)							
66	Edlund, Linda				Ron Fritz (128) Martie Polly (143)				Scott Andrews (143)	
67	Eisenhardt, John				(25-26)					
68	Elam, Rickey	Willie Sands (66)								

S&-14

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
69.	Ellefson, Betty	Vicky (130)			Lana Weicher (131)					
70.	Epstein, David	Ron Coker (46-47) Terry Ricino (65)								
71.	Erwin, Elizabeth	Cullinton – couple times a week (45-46)								
72.	Ethridge, Jodi								(135)	
73.	Fagnani, Al	Connie Ging (35) Tom Belchak (48) Mitch Harris (137)								
74.	Feggins, Lavasier A	Refused to Answer (137-38)								
75.	Fiore, Robert		(30)							
76.	Forler, Larry	(75, 76, 79, 80, 82, 83, 160-162, 174)								

SA-15

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
77.	Fowler, Earl		(16-17)							
78.	Fowlkes, R.C.	(49-50)								
79.	Francis, James P.		(14)							
80.	Freeman, Sue R.	James Duhamel (84)								
81.	Fulton, Brinda	Marcus – Once every week or two weeks (141)								
82.	Gann, Jack	Jack Clement Frank Vogt (65)								
83.	Garza, Rafael		(36)							
84.	Giles, William, R.	Diann Newell (48)	Diann Newell (49)							

SA-16

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
85.	Gondzar, Stanley	Don Whren (45) Don Pickering Bob Petrice (100-01) Pete Naylor (100)			Don Whren (45)					
86.	Gowan, Sherry	Beth Kirby (64)			Ron Coker (63)					
87.	Groothius, Richard St. Louis, MO	Rick Burgstrom (85)[2]								
88.	Guerrero, Nancy		Charles Placker (68-69)							
89.	Guglielmo, Mary			(68-69)						
90.	Gustavus, Sharrian	Brenda Webster (57) Don Youngblood (58) Jerry Monday (97)	Bob Wolfe (97)		Mike Tate Mike Goodwin Bob Russell (58-59)					

[2] DM had office in same building

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
91.	Hahl, James	Mirch Harris							Tom Bolcheck (74-76)	
92.	Hampton, Barbara B.	Target Store (120)								
93.	Hansen, Michelle L.								Jo Ellen McDonald (71)	
94.	Harris, Cora L.								David Geiger (52)	
95.	Harris, Issac T.			Peggy Pedico (81)						
96.	Harrison, Karol		Phyllis Hodge Angie Wolfe Fomest Siegal (68)		John (68)					
97.	Heim, Elden Des Moines, IO	Larry Sprague (71-72)								
98.	Hejl, Leonard				Not as often as I would have liked (104)					

SA-18

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
99.	Hernandez, Jose C. San Antonia, TX									Amy Garcia - 4/5 months Joe Rodriguez (61)
100.	Herrera, Antonia	Ron Coker?			Mark Garris Mike Roessler					Terry Racine
101.	Herriage, Brenda L.		2-3 a month (52)							
102.	Hester, Pamela									(55)
103.	Hill, Magnolia	Bulledge - weekly (32)			Mel Phillips (39)					
104.	Hodge, Calvin	Jack Clements Davis Alfred (38-40)	Lonnie McAffley (38-40)							
105.	Hood, David	Mike Farrell (45)			Mike Farrell (45)					
106.	Houghton, Carla									

SA-19

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
107.	Houston, William									(81)
108.	Hughes, Shelly		Patria Paddock (85-86)							
109.	Hunt, Felicia			Wayne Self (96) Bob Eakins (97)	Al Cork (95)					
110.	Jackson, Clifton Memphis, TN	Marvin Moxley Bob Wolfe (58)								
111.	James, Sharon	Jaine Lopez Frank Vogt (don't remember) (40-41)								
112.	Jertson, James[3] Milwaukee, WI	(35-36)								
113.	Johnson, Michael L.	(126)								

[3] Former DM – As a DM, "at least once a week"

FREQUENCY OF DISTRICT MANAGERS' VISITS

*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
114.	Jones, Gretchen Mryle	Edward Reuve (70-72)								
115.	Jones, Michael D.	Alfred Davis (79)								
116.	Jones, Timothy C.		Ron Coker (43)		Ron Coker (43)					
117.	Kauffman, Marie		Gerald Stimson (44) Mike Greenlees (47)							
118.	Kelley, Mike	Don Reed (Twice a week) (51) Mike Klinepetes (once a week) (51) Larry Lyons (2 or 3 times a week) (54) Wayne Bruno (once or twice a week) (61)								
119.	Kenerson, Sam	(123)								

SA-21

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
120	Kennedy, Ada				Barbara Bohler Shelia Sutton Gary Bailey Jerry Blizzard Bill Taylor (32-33)					
121	Kesterson, Roy	3 times a week (76)								
122	Key, Henritta S				Jerry Bolen – Asst. (47)					
123	Kimsey, Mary	(152)								
124	Knox, Henry	(130)								
125	LaBonte, James	(83-84, 89, 94-95)								
126	Land, Terry	(50, 63-64)								

SA-22

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
127.	Lane, Lori	Frank Venturella (61-62) Nancy Kusky (68)								
128.	Lee, Alvin	James Swanson (143-44)								
129.	Leflore, Patricia D									Tom Edwards (61-62)
130.	Lumley, Mark		(107)							
131.	Maclane, James	Tom Balchak (33-36) Mitch Harris (40)								
132.	Majeski, David Columbus, OH	Bob Smalkowski Tina Rhodes (47)								
133.	Malone, Dorothy M.				Larry Grady (83)					
134.	Mangum, Luther	Kevin Kerns (172)								

SA-23

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
135	Maxwell, Karoline				Ker Peloquin (69)					Jim Hunter (69)
136	McCraney, Tracy		Penny Sledge (65)						Shula Walker (88)	Calvin Watts (81)
137	McDaniel, Chantel		(18)							
138	McElroy, Tammy J.		1 or 2 times a month (71)							
139	McFarland, Donald									
140	McGinnis, John									(165)
141	McGowan, Martha	Donna Jordan (190)								
142	McKenzie, Yolanda				Linda Taylor (47)					

SA-24

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
143.	Meyers, Angela				(50)					
144	Miller, Carmel E.				Pezzalla, Rueve and Laird (40-41)					
145	Miller, John	(31) "Once every one and a half to two weeks"								
146	Mize, Richard Preston Spartanburg, SC				Hardin, Eadis, Young, McGonnell (77)					
147	Moody, Doris	Mitch Harris Tom Balihak (40)								
148	Morgan, Janice R.		Diann Newell (76) Kay Sapnogle (93)							
149	Morris, Charles				(33)					

SA-25

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
150	Muse, Kenneth	Name Unknown (weekly or more) (69-70)			Wayne Bruno (63-64) Lamar Webber (56) Larry Lyons (60-61) Andrew Gibbs (70-71)		Ed Schiller (59)		Wayne Bruno (63-64)	Wes Smith Mike Clempeter (57-58)
151	Myers, David	3 or 4 times per month (49)								
152	Nash, Ethel L. Huntsville, AL									Kay Spanogle (37)
153	Nelson, Carla	1 to 2 a week (24)								
154	Nevins, Lois	(86)								
155	Newberne, Willie	Jim Beasmer (157)			Todd Aike, Jim Craigen, John Dione, Ruth Korndish (80, 85)					Joe Russo (157-58)
156	Notter, Diane K.				Craig Howell Lenay Weichest (100)					

SA-26

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
157	Obasuyi, Winston E.	(152, 186) 3 times a week/ phone daily								
158	Odufuma, Henry O	Bill Scalzo (47)								
159	O'Neal, Paul				Larry Little (114)					
160	Orona, Irenio	(61) Average								
161	Palladino, Paul							(33)		
162	Palmer, Roland				(45)					
163	Papp, Michael									(71-72)
164	Parker, Barbara A		(122-23) three times a month							

SA-27

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
165	Paul, Steven				Ron Wren (53)					
166	Pellegrin, Greg	Mike Kliepenter Mark Garrett (55)								
167	Pendleton, Gary	Keith Police (22)								
168	Perry-Preddie, Veronica								(13)	
169	Pettaway, Gail				Mark Sanner (81)					
170	Pippin, Sheila									Bob Lee (34)
171	Plair, Aqueda				(30)					
172	Potter, Cid		Dennis Treemarchi (59)		Dennis Treemarchi (59)					

SA-28

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
173.	Powell, James G.	Pam Bill (62-64)							George Remington (57) Bob Scheifler (58-59)	
174.	Radosh, Lana				(62)					
175.	Raine, Robin	Robert Mercado (never) (47) – 2 phone calls			Lenay Weichant (61)				Lenay Weichant (61)	
176.	Ralph, Jeffrey		Jim Horton (47-50) Ken Peloquin (69-70)							
177.	Ramos-Correa, Efrain									Ron Venavides Dave Iding (50)
178.	Reed, Trent			Dick Gray (81)						

SA-29

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
179	Reevers, E. Lawrence		Hanford Laird (62) Ron Purdin (67) Peggy Pedigo (67) Travis Kelly (67) David Geiger (73)	Steve Foster (72-73)						
180	Reyes, Carlos	Terry Wunderlick (62) Raymond Rodriquez (67) Mike Rosner (70)								
181	Rhein, Eric Detroit, MI			Rick Smith (76)						
182	Richardson, Barbara J.				Peggy Pedigo (27)				Peggy Pedigo (27)	
183	Robbins, Marcus	Spratlin (73)	Fletcher (46)							

SA-30

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
184.	Robinson, David									Mike Hammock (53) Dan Allen (53) Paul Wright (58)
185.	Robinson, Desiree									
186.	Rodgers, Michelle	Dan Ketterman (80)	Sandy Steele (43) Charlie Carbin (47) Toni Hale (52)							Mike Hammock (51)
187	Rodriquez, Fred	James Wilson (76-77)								
188	Rodriques, Mary L		Tony Wunderlich (41-42)							
189	Rogers, Elizabeth	Bill Faulkner (66)			Bill Faulkner (66)					
190	Rose, Vada									(80-81)

SA-31

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
191	Rosenbeck, Robert	Mike Price (45-46) Dennis Donovan (49)								
192	Ross, Robert				(89)					
193	Sackman, Brenda									
194	Salazar, Beatriz				(65-66)					
195	Sander, James E.	(38) 2-3 times a week								
196	Schmelzle, Anne									(94)
197	Schofield, Thomas			Terry Bryant William Saucier Richard Hoiles (38-39)						

SA-32

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
198	Scrivner, Vickey Jo		Tim Kerce Robert ? Myron Porter Ross ? Al Koch (110)							
199	Shrader, Ansel B.								Kay Spmogle (43, 48, 53-54) Linda Taylor (57)	
200	Sisler, Rodney	(32)								
201	Smallwood, Betsy	Ed Thorwagon (24)		Willie Sands (145-46)						
202	Smith, Cherly	Bill Finch (70) Kevin Godwin (72) Don Roe (76-77)								
203	Smith, Donnie	Mike Sanner (87-88) Mike DeHarea (89) Greg McGill (89-90) Mike Dixon (90)								

SA-33

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
204	Smith, Dorothy J. Huntsville, AL									Kay Spanogle (33-34)
205	Smith, Leona									Terry Wonderlich (90) Steve Pruney (106-07)
206	Smith, Leroy	Larry Fantino (47)	Frank Permatteo (44-45, 47)	Linsa Souza – (45)	*NOTE: This opt-in also has an Assistant DM (48-50)					
207	Smith, Linda D.				Ed Salillen (67) Donald Boyett (67)		Peggy Hall (67)			David Geiger (67-68)
208	Smith, Vivian	Leah Kelly (62)			Arlie Thomas (118) Angie Wolf (119)					
209	Snowberger, Randy				(62)					
210	Spellissy, Marie	Joanne Palmer Charles Wiltshire (97)								
211	Spencer, Sophia J. Cirtonella, AL		Peggy Hall (24)		Peggy Hall (24)					

SA-34

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

SA-35

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
212.	Spruce, David	Ron Shepherd (106)								
213.	St. Hilaire, Theresa	Mike Price (31-32)	Dennis Donovan (44)		Mike Price (41)					
214.	Stanaway, Heather	Lynn Bazinette (30)					Linda Klepadlo (30)			
215.	Stewart, Saundra R		John Bensemer – 3 times a month (113)							
216.	Stockdale, Valerie K									(229)
217	Stoops, Scott		(72)							
218	Stover, Nancy . (Thompson Kidd Tullock)	Early Thomas (50)	Early Thomas (53-54) Angie Wolf (58-59)		Angie Wolf (58-59) Phyllis Hodge (62)				Phyllis Hodge (62)	
219	Stream-Huyck, Shelly	Unable to estimate (53)								

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
220.	Strickland, Mary C.				Peggy Pedigru (41-42, 44)					
221.	Stroud, Rita		Tony Hale (49)	Mike Dixon (48)	Mike Hammock (46)	Dan Patton (45)			Mr. S (47)	
222.	Summerlin, Janet									
223.	Sylvester, Barbara	Lynn Bazzinette (78) Al H. (assistant DM) (68)							Linda Klepadlo (68)	
224.	Tanner, Geraldine				Cal Bryan (76, 77) Richard Hoiles (81)					
225.	Tetley, Regina L.	Amy Garcia (ADM) (93-94)			Gary Web (DM) (100)					
226.	Thornton (Jackson), Glenda A.*									

SA-36

* Unknown 3 year SOL barred

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
227	Trout, Laurie R.				Jill Berm Auburn, NY (40-41		Jill Berm Sodus (33, 73-74)			
228	True, Richard	(40, 97)								
229	Turner, Angela D.	(44)								
230	Turner, James E.		Debbie Aust (89)		Debbie Aust (89)				Bill Finch (89)	
231	Vasquez, Debbie	(100)			(100)					
232	Velazquez, Zenaida		Joe Russo (50)		John Dillon (49)					
233	Vest, Terry A		"once or twice a month"(97)		"once or twice a month" (97)					
234	Vidales, Juan	Jack Lana (50)	Fidel Ramos (52-54)							

SA-37

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
235.	Walker, Pamela E. Georgiana, AL		John Gusmeir & Ed Revu (49-50)							
236.	Walker, Priscilla K				Donald Boyett (95)					
237.	Warren, Charles M.	Howard Leonard -- Every other day (47)								
238.	Washington, Roosevelt		Don Reed (63) Tom Edwards (66)							
239.	Watkins, Roxanne		Ben Sprathn (63) Mark Milner (64)	Willie Sands (63)						
240.	Watson, Duane	(113)								
241.	West, Sr., John W.		Willard Green (56) (Phone calls- - various daily)		Donna Jordan (59)					
242.	Whaley, Birdie Jeanette				Jerry Johns (86)					

SA-38

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
243.	Whaley, Cindy								Gary Bailey (45) Barbara Boylen (54)	Gary Bailey (45) Sheila Sutton (50) Jeff Miller (51)
244.	Wildberger, Richard	Frank Venturella (44) Cathy Liggett (72)	Roy Nunnelly (27)							
245.	Wilkins, Melvin		John Hunter (103-04)							
246.	Williams, Bonnie				Joe Eider (129)					
247.	Williams, Jackie Dallas, TX	Keith Police Don Pack (36)								
248.	Williams, Mike		(95)							
249.	Wilson, Gloria	Jim - daily (41-45) other two DMs 3 times per week (42)								

SA-39

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS

	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
250	Woods, Alonzo	Tommy Nix (39-40) Ae Zayed (47-48)								
251	Woods, Brenda C.				Sometimes 2 times (54-55)					
252	Worthington, Jerry Michigan City, IN		"one or twice a month" (51-52) Mark Dollinger							
253	Wright, James	Fletcher Smith (19-20) Afred Davis (148)								
254	Zamarripa, Evangelina	Fidel Ramos (126)	Jack Lane (121)							
255	Zimmerman, Sonja	Frank Ventrella (69) "Chicago" Don (85-87) Rick Fetters (90)			Cathy Liggett (73-74)					

SA-40

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
1	Adams, Bernice	N	N		N	Y	N	N		Y	Y	N		Y	N
2	Alexander, Angela Faye	Y	Y		Y			Y	Y		Y	Y	Y	Y	Y
3	Allen, Krista	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
4	Allende, Ramon	N	N	N	N	N	N	Y	N	N	N	Y	Y	N	N
5	Alston, Catherine	N	N	Y	Y		Y			Y		Y	Y	N	Y
6	Anderson, Brenda	Y	N		Y	Y		Y	Y	Y	Y	Y		N	N
7	Anderson, Carolyn	Y			Y			Y	Y	Y	Y	Y		Y	Y
8	Arrellin, Joe				Y	Y	Y	Y	Y	Y	Y		Y	N	
9	Attaway, Harvey				Y		Y		Y	Y		Y	Y	Y	
10	Avitia, Petra C.	N	N	N	N	N	N		Y	N	Y	N		N	
11	Backus, Cheryl		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
12	Baker, Shirley	N	N	N	N		Y		Y	Y	Y	Y	Y	N	Y
13	Barbe, Suzette	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y		Y	Y

SA-42

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
14	Barber, Delores W.	N	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
15	Barrentine-Hurley, Mary	N	N	Y	Y		Y	Y	Y	Y	Y	Y	Y	N	Y
16	Beam, Garry				Y	Y	Y	Y	Y	Y	N	Y	Y	Y	
17	Beasley, Ingrid R.	N	N	N	Y	N	N		Y	N	Y	N	Y	N	
18	Bennett, Charles				N	Y	N	Y	Y	Y	Y	Y	Y	Y	
19	Berrios, Porfirio J.	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	Y	
20	Bice, Misty S.	N			Y		N	N	Y	Y	Y	Y	Y	Y	N
21	Blakeney, Julie	Y	Y	Y	Y	Y	Y	Y		Y	Y				Y
22	Bloss, Judy Kay	Y	N		Y	N		Y	Y	Y	Y	Y	Y	Y	Y
23	Bly, Julie	Y			Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
24	Bracey, Katherine B.	N	N	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y
25	Brady, Ruby	Y			Y		Y	Y	Y	Y	N		Y	Y	N

SA-43

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
26	Bremer, Tyrus			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
27	Brown, Judy B.	Y	Y	Y	Y				Y	Y	Y	Y	Y	Y	
28	Brown, Shellah E.	Y	N	Y		Y		Y		Y	Y	Y	Y	Y	
29	Brown, Tom	N	N	N	Y	Y	Y	Y	Y	Y	Y		Y	Y	
30	Brown-Owens, Dianne B.	Y		Y				Y	Y	Y	Y	Y	Y	Y	Y
31	Browne, Janet	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
32	Burke, Linda			Y	Y	Y	Y	Y	Y	Y		Y	Y	Y	Y
33	Butler, Earl E. (Jr.)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y	
34	Butler, Melanie G.	Y					Y		Y	Y	Y	Y		N	Y
35	Butler, Sharon	N	N	Y	N	Y	Y	Y	Y	Y	Y	Y		Y	
36	Caffey, Tomelita B.	N	N	N								Y	Y	N	Y
37	Cannon, Cora H.	Y		Y		Y			Y	Y	Y	Y	Y	Y	

SA-44

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

	Opt-In Plaintiff	Authority to:			Authority to Recommend:				Did you:						
		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
38	Cannon, Geraldine	N	N	N	Y			Y	Y	Y	Y	N	Y	N	N
39	Carrera, Josue	Y	Y	Y				Y	Y	Y	Y	Y	Y	Y	
40	Carter, Norman V.	N	N	N	N	N	N	N	N	Y	Y	N	Y	N	N
41	Carter, Robert J.	N	N	N	N	N	N	N	N	N	N	N	Y	Y	Y
42	Casey, Fletu				Y	Y	Y	Y	Y	N	Y	N	Y	Y	N
43	Charles, Gloria S.	Y	Y	Y					Y	Y	Y	Y	Y	N	
44	Chavarria, Maxima	N	N	Y	Y		Y	N	Y	Y	Y	Y	Y	Y	Y
45	Cheadle, Joe O.		Y								Y				
46	Clark, Latossia B.			Y	Y			Y	Y	Y	Y	Y	Y	Y	
47	Conaway, Diane	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
48	Cooks-Smith, Beatrice M.	N	N	N	Y	Y	Y		N	Y	Y	Y		N	
49	Correira, Daniel J.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	

SA-45

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
50	Corsaro, Candace			Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	
51	Cousin, Richie H.	N		N	N	N	N				N	Y		N	
52	Cruz, Enrique	Y	Y	Y				Y	Y	Y	Y	Y		Y	
53	Cruz, Pansy R.*														
54	Cutchall, Wilma	N	N	N	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
55	Dalton-Goss, Janet	N	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
56	Davis, Lloyd	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
57	Day, Richard	N	Y	Y	Y						Y				
58	Detter, Bill	N	N	Y	Y	Y	Y		Y	Y	N	Y	Y	Y	
59	Dickerson, Angela	N	N	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	
60	Dinolfo, Carol	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
61	Dixon, Rebecca	Y	N	Y	Y	Y		Y	Y	Y		Y	Y	N	Y

SA46

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
62	Dones, Mareo	N	N	N	N	Y	Y		N	N		Y	Y	N	N
63	Duessler, Alice	N	N	N	Y	Y	Y	Y			Y		Y	N	
64	Dunning, Denise	N	N	N	N	N	N		N	N	Y	Y	Y	Y	
65	DuPont, Sandra Kay	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
66	Edlund, Linda		Y	Y	Y	Y	Y		Y	Y		Y		Y	Y
67	Eisenhardt, John		Y	Y	Y				Y	Y	Y	Y	Y	Y	Y
68	Elam, Rickey	N			N			N	N	Y	Y	Y		N	
69	Ellefson, Betty	N	N		Y	Y	Y	Y	Y	Y	N	Y	Y	Y	
70	Epstein, David	Y		Y	Y	Y	Y	Y	Y	Y		Y	Y		
71	Erwin, Elizabeth	N		Y	N		N		N	N	Y	N		N	N
72	Ethridge, Jodi	Y	N	Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
73	Fagnani, Al	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	Y

SA-47

MANAGEMENT DUTIES (29 C F R Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
74	Feggins, Lavasier A.	N	N	N	Y	Y	Y	Y			N			N	
75	Fiore, Robert	Y	Y	Y				Y	Y	Y	Y	Y		Y	
76	Forler, Larry	Y		Y	Y		Y	Y	Y	Y	Y	Y	N	Y	Y
77	Fowler, Earl	N	Y	Y	Y			Y	Y	Y	Y			Y	
78	Fowlkes, R.C.	N	N	Y	Y	Y	Y	Y	Y	Y	Y			Y	
79	Francis, James P.	Y			Y	Y	Y	Y	Y	Y	N			Y	
80	Freeman, Sue R.				Y	Y	Y		Y	Y	Y		Y	Y	
81	Fulton, Brinda	N	N	N	Y	Y	Y	N	N	Y	Y	Y		N	Y
82	Gann, Jack		Y	Y	Y				Y	Y	Y	Y	Y	Y	Y
83	Garza, Rafael		Y	Y						Y	Y	Y		Y	
84	Giles, William, R.	Y				Y		Y	Y	Y	Y		Y	N	
85	Gondzar, Stanley			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

SA-48

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
86	Gowan, Sherry	N	N	N			N	N	N	N	N	N	N	Y	
87	Groothuis, Richard	N	N	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y
88	Guerrero, Nancy				Y		Y	Y	Y	Y			Y		
89	Guglielmo, Mary	N	N	N	Y	Y	Y		Y	Y	Y	Y		N	Y
90	Gustavus, Sharrian	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
91	Hahl, James	Y		Y		Y	Y	Y	Y	Y		Y	Y	Y	
92	Hampton, Barbara B.	Y	Y					Y	Y	Y	Y	Y	Y	N	
93	Hansen, Michelle L.		Y	Y			Y		Y	Y		Y	Y	Y	
94	Harris, Cora L.				N				N	N	Y				
95	Harris, Issac T.	N	N	N	Y	Y	Y		Y	Y	Y	N		N	N
96	Harrison, Karol		Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
97	Heim, Elden	N	N	N	Y				Y			Y	Y	Y	

SA-49

SA-50

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
98	Hejl, Leonard	Y	Y	Y	Y			Y	Y	Y	Y	Y		Y	Y
99	Hernandez, Jose C.	Y	Y	Y		Y			Y	Y		Y	Y	Y	
100	Herrera, Antonia	N		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
101	Herriage, Brenda L.	N		Y	Y	N	Y		Y	N	N	N	Y	N	
102	Hester, Pamela	Y		N		Y	Y	Y	Y	Y	Y	Y	Y	N	Y
103	Hill, Magnolia			Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
104	Hodge, Calvin	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
105	Hood, David			Y	Y	Y	Y		Y	Y	Y	Y		Y	Y
106	Houghton, Carla	Y	N	Y	Y	Y		Y	Y	Y	Y			Y	N
107	Houston, William	N		Y					Y	N	Y	N	N	N	N
108	Hughes, Shelly	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	
109	Hunt, Felicia	Y	N	N	Y	N	Y		N	N	Y	N		N	N

SA-51

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

	Opt-In Plaintiff	Authority to:			Authority to Recommend:				Did you:						
		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
110	Jackson, Clifton								N	Y	Y	Y	Y	N	
111	James, Sharon	Y		Y							Y				Y
112	Jertson, James	N	N		Y	N				Y	N	Y	Y		Y
113	Johnson, Michael L.	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y		
114	Jones, Gretchen Mryle	N	N	N	Y		N		N	Y		Y	Y	N	Y
115	Jones, Michael D.	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
116	Jones, Timothy C.	Y	N	Y		Y			Y	Y	Y	Y	Y	N	Y
117	Kauffman, Marie			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
118	Kelley, Mike	Y		Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
119	Kenerson, Sam	N	N	Y	Y	Y		Y	Y	Y	N	Y	Y	Y	
120	Kennedy, Ada	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
121	Kesterson, Roy				Y	Y	Y	Y	Y	Y	Y	N		N	N

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
122	Key, Henrrita S.	N		N					N	N		N	Y	N	
123	Kumsey, Mary	Y	N	N		Y	Y	N	Y	Y	Y	Y	Y	Y	Y
124	Knox, Henry	N	N	Y	Y	N		Y	Y	Y	Y	Y	Y	N	Y
125	LaBonte, James	Y		Y		Y	Y	Y	Y	Y	Y	Y		Y	Y
126	Land, Terry	N	N	N	Y	Y	Y			N	N	N			
127	Lane, Lori		N	N	N	N	N	N	Y	Y	Y	N	Y	N	N
128	Lee, Alvin	N	N	Y	Y	Y	Y		Y	Y	Y	Y		N	Y
129	Leflore, Patricia D.				Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y
130	Lumley, Mark				Y	Y	Y		Y	Y		Y	Y	Y	
131	Maclane, James	Y				Y	Y	Y	Y	N	Y	N	Y		N
132	Majeski, David	N	N	N	N	N	N		N	N	N	N	Y		
133	Malone, Dorothy	Y	Y	Y	N					Y	Y	Y	Y	Y	Y

SA-52

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
134	Mangum, Luther	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
135	Maxwell, Karoline	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		N	Y
136	McCraney, Tracy	N		Y	Y			Y	Y	Y	Y	Y	Y	Y	Y
137	McDaniel, Chantel	N	N	N	N		N		Y	N	Y	N	N	N	
138	McElroy, Tammy J.		N		Y			N	Y	Y	Y		Y	Y	N
139	McFarland, Donald	Y	Y	Y	Y	Y	Y	Y	Y		N	Y	Y	Y	
140	McGinnis, John	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
141	McGowan, Martha	N	N	N	Y	Y	Y	Y	N		N	N		N	
142	McKenzie, Yolanda				N	N	Y	N	N	Y	Y		Y	N	
143	Meyers, Angela	Y		Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y
144	Miller, Carmel E.	Y		Y				Y	Y	Y	Y	Y		Y	
145	Miller, John				Y	Y			Y	Y	Y	Y		Y	

SA-53

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend				Did you:							
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
146	Mize, Richard Preston	N	N		Y			Y	Y	Y	Y	Y	Y	Y	
147	Moody, Doris				Y	Y	Y	Y		Y	Y	Y		Y	Y
148	Morgan, Janice R.	Y	Y	Y					Y	Y	Y	Y	Y	N	
149	Morris, Charles	Y	Y	Y				Y	Y	Y	Y	Y	Y	N	N
150	Muse, Kenneth	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
151	Myers, David	N		Y		Y	Y		N	Y	Y	Y	Y	Y	
152	Nash, Ethel I.	N	N		Y		N		Y	Y	Y	Y		Y	
153	Nelson, Carla	Y	N	Y		Y	Y		Y	Y	Y	Y			
154	Nevins, Luis	Y	N	N		Y	Y	Y	Y	Y	Y	Y	Y	N	N
155	Newberne, Willie	N	N		Y	N		Y	Y	Y		N			N
156	Notter, Diane K.				Y	Y	Y	Y	Y	Y	Y		Y	Y	
157	Obasuyi, Winston E.	N		N	Y		Y	N	Y	Y	Y	Y	Y	Y	N

SA-54

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

	Opt-In Plaintiff	Authority to:			Authority to Recommend:				Did you:						
		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
158	Odufuma, Henry O.	N	N	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	
159	O'Neal, Paul	N	N	N	Y	Y	N	N	Y	Y	Y	N	Y	N	
160	Orona, Iremio	N	N	N	N	N	Y		Y	Y			Y	Y	
161	Palladino, Paul	Y		Y		Y		N	Y	Y	Y	Y		Y	
162	Palmer, Roland	Y	Y	Y					Y	Y	Y	Y	Y	Y	Y
163	Papp, Michael			Y	Y	Y				Y	Y	Y	Y	Y	Y
164	Parker, Barbara A.		N	Y	Y	N		Y	Y	N	Y	Y	Y	N	
165	Paul, Steven	Y		Y	Y		Y		Y		N	Y	Y	Y	Y
166	Pellegrin, Greg	N	N	Y	Y	N		N	Y	Y	Y	Y	Y	N	
167	Pendleton, Gary	Y	Y	Y				Y	Y	Y	Y			N	
168	Perry-Preddie, Veronica	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
169	Pettaway, Gail	N			Y	Y	Y	Y	Y	N	Y	Y	Y	Y	N

SA-55

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
170	Pippin, Shelia	N	N	N	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	N
171	Plair, Aqueda	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	N	Y
172	Potter, Cid			Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
173	Powell, James G.	Y				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
174	Radosh, Lana	Y		Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	
175	Raine, Robin	Y		Y	Y			Y	Y	Y	Y	Y	Y	Y	
176	Ralph, Jeffrey	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
177	Ramos-Correa, Efrain	Y		Y		Y			Y	Y	N			N	
178	Reed, Trent	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
179	Reevers, E. Lawrence		N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	
180	Reyes, Carlos				Y	N	Y	Y	Y	Y	Y	Y	Y	Y	N
181	Rhein, Eric	N	N	Y	Y	Y			Y	Y	Y	Y	Y	Y	

SA-56

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
182	Richardson, Barbara J.	Y	Y		Y	Y		Y	Y	Y	Y	Y	Y	N	
183	Robbins, Marcus	Y		Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
184	Robinson, David	N	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
185	Robinson, Desiree	N		Y	Y	Y	Y		N	Y	Y		Y	Y	N
186	Rodgers, Michelle		Y	Y	N		Y	N	Y	Y	Y	Y	Y	Y	Y
187	Rodriquez, Fred	Y	N	Y	Y	Y			Y	Y	Y	Y	Y	N	
188	Rodriquez, Mary L.	Y	N	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
189	Rogers, Elizubeth	N	N		Y	Y		Y	Y	Y	Y		Y	N	
190	Rose, Vada	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
191	Rosenbeck, Robert		N		Y			Y	Y	Y	Y		Y		N
192	Ross, Robert	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
193	Sackman, Brenda	Y	Y	Y					Y	Y	Y	Y	Y	Y	

SA-57

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
194	Salazar, Beatriz	Y	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
195	Sander, James E.	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
196	Schmelzle, Anne	N	N	Y	N	N			N	Y	Y	Y	Y	Y	Y
197	Schofield, Thomas	N	N	N		Y	Y	Y	Y	N	Y	N	N	N	
198	Scrivner, Vickey Jo				Y		Y	Y		Y			Y	Y	
199	Shrader, Ansel B.				Y	Y	Y		Y	Y	Y	Y	Y	Y	
200	Sisler, Rodney	Y	Y	Y				Y	Y	Y	Y	Y	Y		
201	Smallwood, Betsy	Y	N	Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
202	Smith, Cheryl	Y		Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
203	Smith, Donnie		Y	Y	Y	Y	Y		Y	Y	Y	Y		Y	
204	Smith, Dorothy J.	Y	N	N	Y		Y	Y	Y	Y	N	Y		N	
205	Smith, Leona	N	N	N	Y	Y			Y	Y	Y	Y	Y		Y

SA-58

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
206	Smith, Leroy	Y	Y	Y		Y	Y		Y	Y		Y	Y	Y	
207	Smith, Linda D.	Y		Y	Y	N		Y	Y	Y	Y	Y	Y	Y	
208	Smith, Vivian	Y			Y	Y	Y		Y	Y	Y		Y	Y	
209	Snowberger, Randy	Y	Y	Y	Y	Y		Y	Y	Y	Y	N	Y	Y	
210	Spellissy, Marie	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y		Y	N
211	Spencer, Sophia J.	Y			Y					Y		Y	Y	Y	Y
212	Spruce, David			Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	
213	St. Hilaire, Theresa		N		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
214	Stunaway, Heather	Y													N
215	Stewart, Saundra R.	Y	Y	Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
216	Stockdale, Valerie	Y	N	Y		N			Y	Y	Y	Y	Y	Y	Y
217	Stoops, Scott	Y	Y	Y					Y	Y	Y	Y	Y	Y	Y

SA-59

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
218	Stover, Nancy (Thompson Kidd Tulleck)	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
219	Stream-Huyck, Shelly	Y		Y				Y	Y	Y	Y	Y	Y	Y	
220	Strickland, Mary C.	N	N	Y	Y	Y		N	Y	Y	Y	N	Y	N	Y
221	Stroud, Rita	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
222	Summerlin, Janet		N	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	
223	Sylvester, Barbara	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
224	Tanner, Geraldine	Y	N		Y			Y	Y	Y	Y			Y	Y
225	Tetley, Regina L.				Y				Y						
226	Thornton, Glenda A. (Jackson)										Y			Y	
227	Trout, Laurie R.	Y		Y	Y			Y	Y	Y	Y		Y	Y	
228	True, Richard	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
229	Turner, Angela D.	N	N	N	N	N	N	N	N	N	N	N	N	N	

SA-60

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
230	Turner, James E.	N	N	N	N	N	N	N	Y	Y	N	Y	Y	N	Y
231	Vasquez, Debbie	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y
232	Velazquez, Zenaida	N	N	N	N		Y		Y	Y	Y	Y	Y	N	
233	Vest, Terry A.	Y	Y	Y					Y			Y	Y	Y	
234	Vidales, Juan	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
235	Walker, Pamela	Y			Y				Y		Y	Y	Y		Y
236	Walker, Priscilla	N	N	N	Y			N	Y	Y	Y	Y	Y	N	Y
237	Warren, Charles				N	N	N	N	N	Y	Y	Y		N	
238	Washington Roosevelt	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	Y	Y
239	Watkins, Roxanne			Y	Y	N		Y	Y	Y	Y	Y	Y	Y	Y
240	Watson, Duane	Y	N	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
241	West, Sr., John W.	N	N	N	Y		Y	Y	Y	Y	Y	Y	Y	Y	

SA-61

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
242	Whaley, Birdie J	Y		Y		Y					Y	Y	Y	Y	
243	Whaley, Cindy	Y				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
244	Wildberger, Richard	Y			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
245	Wilkins, Melvin	Y		Y		Y		Y	Y	Y	Y	Y	Y	N	Y
246	Williams, Bonnie		Y	Y	Y			Y	Y	Y	Y	Y	Y	Y	Y
247	Williams, Jackie				Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y
248	Williams, Mike	N	N	Y	Y	Y		Y	Y		Y	Y	Y	Y	
249	Wilson, Gloria	N		N	Y				Y	Y	N			N	
250	Woods, Alonzo	N	N		N	N	N	Y	N	N	N	Y	Y	N	N
251	Woods, Brenda C.	Y		Y		Y			Y	Y	Y	Y	Y	Y	
252	Worthington, Jerry	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
253	Wright, James	N	N	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	N	Y

SA-62

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
254	Zamarripa, Evangelina		N	N	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
255	Zimmerman, Sonja	Y				Y	Y	Y	Y	Y	Y	Y	Y	Y	N

SA-63

MO N v. FAMILY DOLLAR

MANAGEMENT DUTIES (29 C.F.R. § 11.102)

	Opt-In Plaintiff	Authority to:			Authority to Recommend:				Did you:						
		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
	Yes	106	51	141	164	143	125	146	206	209	201	188	182	163	109
	No	92	105	52	26	28	21	23	24	23	26	28	6	68	31
	% Yes	54%	33%	73%	86%	84%	86%	86%	90%	90%	89%	87%	97%	71%	78%
	% No	46%	67%	27%	14%	16%	14%	14%	10%	10%	11%	13%	3%	29%	22%
	Totals	198	156	193	190	171	146	169	230	232	227	216	188	231	140

SA-64

MANAGEMENT DUTIES (29 C.F.R. § 541.102)

		Authority to:			Authority to Recommend:				Did you:						
Opt-In Plaintiff		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
1.	Adams, Bernice	136	137		72-74	92, 95	94-95	76-77		66, 83	86-88	84-86, 120-21		76-77	84-86, 97
2.	Alexander, Angela Faye	59-67	68-69		136			116-17	62-63, 65		84, 73-74	84-86, 88-89	91-92	83-84, 105-07	86, 89, 91
3.	Allen, Krista	93, 125	118, 126	56-57	93	52-53	56-57	73-75	62-64	45-51, 96, 146	64	51-52, 83-90, 100-02	24-25, 131-32	59-61	100-03
4.	Allende, Ramon	55, 68, 70, 102, 130-31	15, 124	122-26, 130	55, 75-76	15, 122-24	122	46-47, 106	69, 70, 80-81	136-37	57-58, 68, 94-96	145-146, 161	181, 187	139-40	55
5.	Alston, Catherine	69-72, 74-75	76-77	81	69-72, 74-75		82			24-26, 51		47, 55-62, 107-08, 123	90-91	101-02	109-10
6.	Anderson, Brenda	182-84	207		182-84	208, 210-15		176-82	183, 189	102, 121-24	191-96, 199-200	120-23		184-87	118
7.	Anderson, Carolyn	43, 47-48, 51-52			47-48, 86			37-38, 94, 105	47-50	83-84, 89	99-102	76-79		103	143-44, 152, 163, 172
8.	Arrellin, Joe				53-55	63-64, 107	55-56	95-96	53, 106	68-69	80-91		22-23, 119-20	91-92	
9.	Attaway, Harvey				55-57		47-50		56	34		85	34-35	52	
10.	Avitia, Petra C.	48-49, 59-60	68	70-73	51-52, 53-59	64-68	70-73, 84		61-63	99	73-75	82-85, 109		100	

SA-66

11	Backus Cheryl		59	85-86	119-20	59	85-86	80-81, 119	85	85, 89-90	66	71, 80, 89-90, 117-18	87-88	81-82	117-18
12	Baker, Shirley	41-43, 65-66, 137	91-93, 137, 154-55	137	41-43, 64-66		91-93, 97, 164		41-43, 64	31-32, 102, 118	119-20, 132	49-50, 104, 115, 128-29, 134, 144, 159-60	142-44	43, 90	141-42
13	Barbe, Suzette	42-48, 103	90	94, 97	100-01		95	36-37, 97-99	44-48, 102-03	25-28, 79-80, 111	49-51, 104	110-11		111-13	110-11
14	Barber, Delores W	75-77	151-52	85, 99, 103	75	78-79, 95		24-25	75	85	92-93	86	106-07	32-33, 86	86-87, 104
15	Barrentine-Hurley, Mary	27-38	64-65	61	32-34, 72-74	64-65	55-58	24, 116-17, 197	28, 38, 72-73	20-21, 61, 76, 79-83, 121-22, 177, 180-81	135, 181-82, 188	53-54, 163, 166-67, 177, 180, 204-05, 215-16	95-105, 114-15	172-73, 175	49-50, 53, 168-69, 217-18
16	Beam, Garry				77-78	91-92	89-90	74-75	77, 79	97-98, 110	87	101	124	104-05	
17	Beasley, Ingrid	81, 168	113	113	81	113	113		72	96-103	117, 164	140, 201	157-58	106	
18	Bennett, Charles				52-61	85-86	84	80	52	112	87-89, 127	71-72, 97-98	103-05	77	
19	Bermos, Porfino J	38	44, 46-47	62	41			53	41-43	51-54	54-57	69	63-65	57-60	
20	Bice, Misty S	98, 101			98, 101, 135-36		165	161	101	137	156	166	214	85	238
21	Blakeney, Julie	58, 61, 67-68	79	147-48	59	71	147-50	31-32, 68, 107, 114-15		103-04, 106-08	122-23, 127-28				93-94
22	Bloss, Judy Kay	107	115		107-08	115		113-14	129-33, 160-61	162-63	122, 141	146-48, 150, 153-55	71, 97, 109	111-12	146-48
23	Bly, Julie	40-46	68-69		40-46, 49	69	69-71, 75	54-56, 66-68	54, 58-59	52, 62-64	75-76, 80-81	71-74		64-65	73, 82

24.	Bracey, Katherine B.	57-64	89-90	86-88, 90-93	57-64	89-90	86-88		57-64	100	117	78-81, 90-93	106	76, 93-94	78-81, 99-100
25.	Brady, Ruby	40-41			40-42		119, 61-62, 65	62-63	43	92-93	52		86	50-51	96
26.	Bremer, Tyrus			92-93, 98-100, 141-42	71-73	89-92	92-93	81-82	72-73, 83	142-44	53-54, 164	121-23, 162-63, 167, 173-74	175-78	136, 139, 170-71	124-26
27.	Brown, Judy B.	73-74	33	96	64-65, 73-74, 75, 78				64	90-91	22, 23, 25, 26	84	51-52, 91, 92	148-51	
28.	Brown, Shellah F.	56, 72-73	94	93-94		94		95-96		86, 101-02	102-03	135	115-18, 122	99-101	
29.	Brown, Tom	81-82, 194	81-82, 113	99-100	81-85, 94-97, 194	81-85, 110-11	99-100, 204-05, 209	141-44	73-74	88	114-23		157-60	136-44	
30.	Brown Owens, Dianne	66-67		69-70, 73-74, 91, 93				94-95	68	103-04, 138	58-62, 65-66	113, 124-26	106-07	97-101	124-25
31.	Browne, Janet	49-50, 164	108	96-97, 103-04, 129-30, 105-08	77-81, 93-94	110-11, 114-15	105-08	45-46	46-48, 77	51-52,, 97-98, 134	54-55, 63-64, 66-67, 149-50	74-75, 99-101, 139, 128-30, 134, 150	132, 135-36	139-40, 141-42	99-100, 154
32.	Burke, Linda			89	67-79	81-90	81-90	79-80	77-78	44-46		90-91	113-14	100-02	92-94
33.	Butler, Earl F. (Jr.)	83-84, 108-09	84-85	121	83, 108-09	29-30, 84	121	125-26	83-84, 106-08	21-22, 117-18	82, 127-29, 131		161-65	114, 125	
34.	Butler, Melanie G.	64-68					54-55		66	68-69	48-49, 71-72	44, 88, 79-80		71	84, 71-72
35.	Butler, Sharon	58-60, 112-12	145	142-43	61-63, 111-12	135-36	146-47	150-51	50, 56-57, 68, 108-09, 155	154	167-69, 172-73	90-92, 94, 96-97, 120 21, 156, 202		161-62	
36.	Caffey, Tomelita B.	38-42	56	54-57								32, 46-47, 49, 66, 91	65	65-66	32, 46-47, 49, 66, 91
37.	Cannon, Cora H.	72-75, 149		86-89, 90, 98		153-54			72-75	182-86	132, 165-67	92-93, 185-86	190-94	58, 70	

38.	Cannon, Geraldine	52-57	98-99	70-75	52-57			61	55	58	78	77, 89	82	84	91-92
39.	Carrera, Josue	30-31	30	63-64				126	59	37, 41, 61	61-62	64-65	69-70	55-56, 58-59	
40.	Carter, Norman V.	134	137	137	134	140	138	138	126	98	106-07	143	149	142	
41.	Carter, Robert J.	83, 91, 95, 122-24	91, 95, 122	84, 87, 95, 122	83, 89-90, 122	91, 122, 129	84, 87, 122	128-29	84, 131	107, 130	74-78, 138-39	87-88, 131	142-48	91-92	106, 130-31
42.	Casey, Fleta				91-92	111-12	109-10	92-93	117-18	118-19	122	125	131-32	59-60, 122	124-26
43.	Charles, Gloria S.	87, 89, 92, 97, 101, 108	98	99, 101, 142-43, 151, 156					87, 92	112-14	126, 129-30	134-35, 140, 142	171-72, 188	133	
44.	Chavarria, Maxima	52-58	67	69-71	52-58		69-71	59	52-58	77, 103	62-64	76-77, 82, 95-96	86-89	74-75	92
45.	Cheadle, Joe O.		97-99, 154-55								89, 95				
46.	Clark, Latossia B.			77-78	64-72			89	64-65	49	83	49-50, 54	118	46, 123-24	
47.	Conaway, Diane	52, 57, 61	74-75	69-73	62	74-75	69-73	62	59	63, 78	81-85	56, 76, 79	96	64	
48.	Cooks-Smith, Beatrice M.	107	107	86-87, 107	107	107	86-87, 107		80	81-82	68-70	83		84	
49.	Correira, Daniel J.	35, 45	46-47	45-46	35-40	46-51	45-46, 50-52	41-42	35-36	62	60-61	55	75	57-58	
50.	Corsaro, Candace			68	45-48	55-56	57	52-54	43-44	70, 80-81	75-76	79		73-74	
51.	Cousin, Richie H.	78		45-46	49-52	60, 77	45-46				82	34, 44		85	
52.	Cruz, Enrique	110 11	115-16	120-21				103-04	96	134	82	112, 126		119, 127-28	
53.	Cruz, Pansy R.[1]														
54.	Cutchall, Wilma	38-43, 70-72,	64-66, 207	67	41-43, 71-72,	65-66	67-69	58-60, 61-62	40, 71, 123-24	62-63, 102-03,	167-68	86-90, 94-95,	173-76, 189	13, 18, 34-35	190

[1] Deposition cut short because deponent is subject to 3 year statute.

		207			111, 122-23, 124-25					138-39		97, 101, 143-44, 160-61, 165-66			
55.	Dalton-Goss, Janet	86-87	101	99	86-87	101		94	85	94	102	127	106	94	126-27
56.	Davis, Lloyd	39-43	46-51	55-57	39-43	46-51	55-57	34-36, 116-17	37	103-04	78	57-58, 98-100	73-76	65-68	98-100
57.	Day, Richard	35-36, 154-55	78-79, 83	64, 78	39-43,						59-62				
58.	Detter, Bill	71-72	184-87	182-83	71-72	184-87	182-83		48-49, 55, 65	101-04; 107; 153	144	202	197-98	108	
59.	Dickerson, Angela	41-51	77	76-77	41-51	77-82	76-77		41-42	55-57	85-87	90-91, 102-03	94-95, 98, 107	60-61	
60.	Dinolfo, Carol	21-22, 36-37		149-52		45-48		37-38	213-15	44-45, 80	90-91, 139, 143-44, 148	158, 165-66	77-79	26-27, 49-50, 52-53	199-200
61.	Dixon, Rebecca	113-20	88-92	80-81, 160-61	155	88-92, 121-22		135, 146	35	81-82, 101, 109-10, 125, 139, 145-46		97, 130-31	154	111	130-31
62.	Dones, Mateo	33-39, 44	77	71, 77-78	38-39	72-74, 77	77-78		33-37	18-19, 50	107-114	90-94	127-29	62-67, 70	80-83
63.	Duessler, Alice	33, 102	33	47	33, 102	33, 70, 102	71	56, 93			48-49		34-35, 93-96	93	
64.	Dunning, Denise	72-77, 92-94	77-82	66-72, 139-40	72-77, 92-94	77-82	66-72, 139-40		72-76, 92	94	87-88	62, 139	47-49, 128	84-85	
65.	DuPont, Sandra Kay	61-73, 115-16		82-83	61-73	73-75	82-85	127-28	68	33, 116	129	88-94	117-18	113-15	120-22
66.	Edlund, Linda		187-88	191	182-85	190-91	191		180	98-99, 160-62		201-02, 177		197-99	201-02
67.	Eisenhardt, John		72	76	53				51	61	77	93-94	91-92	65	92
68.	Elam, Rickey	69-73, 76			74			84	67	83	94-95, 123	105-07		104	
69.	Ellefson, Betty	104-05	189-90, 195-96,		105-09, 262	298-99	205	262-63	99, 106, 116-17,	243-45, 249	258-60	172, 175,	249-50	211-12	

SA-70

			201, 298-99						121			251-52, 276			
70.	Epstein, David	83-90		67, 69-70	83-90	36, 71	70	48-49	30-34, 86	74-76		42-44, 66-67	39, 101-02		
71.	Erwin, Elizabeth	33-37		39, 41	33-37		40		33	48, 66	17-18	41-42, 45		43	29
72.	Ethridge, Jodi	86-87	103	102		106-07		125	80	65	94-95	132-33	66	112	134
73.	Fagnani, Al	79-80, 82, 98, 150	138	31-33, 52-53	64-66	64-66			62, 77, 82, 98	22, 41, 68-70, 111-12, 127-28	28-31, 51-52, 107, 142	37-38, 71, 85, 122, 137	86-87, 131	55-57, 108, 141	37-38, 71, 85, 122, 137
74.	Feggins, Lavasier A.	63-64	87-88	85-86	63-64, 241	87-88, 261	85-86	222-23			30			135	
75.	Fiore, Robert	53-54, 38	65-66	64				52-53	56	76	72-74	93		70	
76.	Forler, Larry	78, 97-98		116-17	78, 93, 172-73		116-17	137	105-06, 108-11	87, 113-15	65, 82, 122	53, 60, 63, 157, 172	150-52	67, 121, 187	138, 154-56
77.	Fowler, Earl	29	31-32, 39-40, 42-43	54	29			78, 157	25-27	49	63-64			59-60	
78.	Fowlkes, R.C.	36	36, 57	55	36-37	36, 57	54-55	34-35, 57-58	36	51-52, 79	47-48			35, 57-58	
79.	Francis, James P.	40-51			54-56	69-72	73-74, 79-80	54-56	40, 47	115-16	85-92			124-25, 128	
80.	Freeman, Sue R.				70, 92	65	107		70	82, 120-21	95-96		126-27	84, 86, 88	
81.	Fulton, Brinda	68-79	106-07	93-94, 107	72-74	94-95	93-94	126	74-75	79-85	112-15	124, 131-34		90-91	
82.	Gann, Jack		106-08	104-06	78, 80-81				80	72-73, 82-83	61, 64, 88-90, 92-93	24-25, 118	48-51	27	18-20
83.	Garza, Rafael		55-56	66						81-82	58-61	97		75-76	
84.	Giles, William, R.	106				98-100		122	106	93-94	92		154, 196	113	
85.	Gondzar, Stanley			64-65	49-53, 62-63, 103-04	66-68, 108-09	114-16	111	50	30, 58, 74, 76, 102	39, 70-71, 91	55, 71	59, 75-76	46-47, 80	55, 77-78

SA-71

86.	Gowan, Sherry	79-80, 82-84	120	89-90			108	76-77	82-83	122-23	100	94-95, 98, 122	121-25	109-10	
87.	Groothius, Richard	31-44, 65	68-70	66-70	31-44, 65	68-70	66-70		31-44, 63	45-56	103-04, 109-10	65-66, 76-85, 107	46, 52-53	97-99	76-85
88.	Guerrero, Nancy				42-43		55	67-68	41	59, 85			72		
89.	Guglielmo, Mary	63-66, 70	98	97-101	70, 73, 75	97-99	97-101		64, 76	86-87	102-107	89, 93-94, 139		81-82, 86	94, 136
90.	Gustavus, Sharrian	44-46, 49-50, 80-81, 84, 87	113, 116, 120, 123-24	171	45-46, 76, 84	120-21	112-13, 171	127-28	43, 83, 93, 204	55, 69-70, 190	133-34, 142	175, 185, 216	188-89	72, 131	215
91.	Hahl, James	118, 120		140-41		101	141	91, 102-03, 125-27	119-20	68, 90, 103-04		68, 90, 103-04	83	133-34	
92.	Hampton, Barbara B.	101	112					82	103-04	131	84	158	155	106	
93.	Hansen, Michelle L.		49-52, 120, 128	58-60			58-60		83	100-02		56-57, 66-68, 102-04	94	83-84	
94.	Harris, Cora L.				56-62				56-62	56-62	53-55				
95.	Harris, Issac T.	45-53	59	56-59	45-46, 49-53	59	56-57		52, 75	77-78	44-45	60-63		54	60, 63
96.	Harrison, Karol		116		106, 112	117	141	82	110	78, 124	152-53	102, 175-76	150	98	
97.	Heim, Elden	44-45, 113, 126	51-52, 113, 126	56	44-45, 92				45			61, 97-98	65-66	62-64	
98.	Hejl, Leonard	17 34	34 39	61-62	17-31			21-23	28-34	83-84	39, 74, 140-41	64, 135		65-67	135
99.	Hernandez, Jose C.	40-41	45-47	44, 47		45-47			41	55		48-49, 55	69-70	56	
100	Herrera, Antonia	92		105, 130	92	92-93	130	109	84-86, 88-89	94, 145-46	114-16	129-30, 137	67-73, 136,	101, 112-13	136-37
101.	Herriage, Brenda L.	40		83-85	42-51, 115-17	59-60	83-85		48	83	87-88	85, 92-93	89	86	
102	Hester, Pamela	98-99, 82-83, 78		109-10		117	110-11	104	55	86-87	118	141	139-40	99	141

SA-72

103	Hill, Magnolia			51, 112	21-24	77-78	51-52, 112	179-80	21-22	55-56	79, 162-66	54, 97, , 114-19, 129, 149-52		63-64	129
104	Hodge, Calvin	81, 90	111	73-74, 109	84-86	111-15	109-11	92-94	82-84	103-05, 107	116-17, 119-21	118-19	124-26	99-103	118
105	Hood, David			91-92, 132	70-72	94	92-93		70-71	89-90, 135-36	82-83, 85	119		95-96	88, 104-10, 118-19
106	Houghton, Carla	45-50	53-54	71-72	46, 48, 58	53-54		53	45	52	76, 79-81			61	112-13
107	Houston, William	25-41		61					30	96-98, 183	59	153, 167-68, 113, 116	172	100-02	153
108	Hughes, Shelly	45-46, 54	43-44, 63-64	62	45-46, 54-55	43-44, 63	62-63	55-58	45-46	46-48	65-69	70-72, 74-75		48-49	
109	Hunt, Felicia	112-15, 133	179	198	119-20, 128, 136-37, 148	154-58, 179	149-50		121-22	161-63	177-78	167-68, 180		163-65	167-68
110	Jackson, Clifton								36	72-73	53, 90	52-53	43-44	69-70	
111	James, Sharon	75-77		103-05, 121							92-93				111-12
112	Jertson, James	39-45, 113-18	47-48		44-45, 113-18	48-54				128, 132, 141	82-94	108, 124-25	131-32, 139		123-24
113	Johnson, Michael L.	145	145	107, 109-10	100-05	112-13	107	135, 137	57, 96-97, 99-100	70-71	62, 65-67	132, 144	157, 141		
114	Jones, Gretchen	78, 151	152	100-02	80-82		100-02		78, 83, 86	92	58-62, 66-67, 99-100	133-34	127-31	96	133-34
115	Jones, Michael D.	36 39	62	62, 72	36-39, 47	62-64, 82	62, 72	61-62	55-56	55, 71	64-68, 82	71-74		56-57	72-74
116	Jones, Timothy C.	50-55, 89	50, 55-61	59-60, 90		55-61			50	73	63	61-63, 72-73	73-76	66	72-73
117	Kauffman, Marie			77	67, 72	81	78	72	66-67	88	88	92, 100	90	86	93
118	Kelley, Mike	86		102-03, 105	86	108-09		87	83-84	54, 69, 80-81, 84, 110	91	75, 115	138	89-90	77

SA-73

119.	Kenerson, Sam	47, 56, 147	47, 56, 147, 173	69-70, 152	47, 53, 147	47, 69-70, 147, 173		71-73	47, 156	79-81	153	81	124-31	60-61	
120.	Kennedy, Ada	81-82, 137		98, 102, 137	83	99, 121	101	88	79-82	92-93, 105	108-09	79, 120	122-24, 133	87-88, 99-100	
121.	Kesterson, Roy				31-33	34	46-47	92-93	31-33	89	63-65, 65-67	102, 112		38, 110	110
122.	Key, Henritta S	57		57, 66					58	54, 66		57, 59, 65	65	57-58	
123.	Kimsey, Mary	40-44	73	73		76	74	48	39-40	52	104	77	96-97	56	77
124.	Knox, Henry	106-08	95	94, 109-10, 120	106-08, 126	95		188-89	100-01	159-60	135	178	195-96, 228, 240-44	164	193
125.	LaBonte, James	18-24		37-38, 123		27-28, 31-37	41-42, 114, 123	45-46, 172	23-24	100, 103, 122	71-74, 76, 113, 133-34	86-88, 122, 124-28, 150, 180-82		101-02, 129	86-87, 112, 152
126.	Land, Terry	49	49	167	49-50	49-50, 62	62			165-66	83-85	167			
127.	Lane, Lori		101	99-100	103	96-97	101	106	102	89	107	108	137	107	108
128.	Lee, Alvin	149-54	194	179, 192-94	149, 151, 154	196	192-94, 196		149-50, 154, 163	165-67	201-02	167-69,184		202	167-68, 201-02
129.	Leflore, Patricia D.				101-03	103-04	103-04, 115-16	99-100	100-01	98-99, 111	109-10	56	138-39	108-09	58-59
130.	Lumley, Mark				86, 91-92, 94, 95	126-27	124		88	117-18		114	136-37	133	
131.	Maclane, James	79-80				62-63	64	99	76	85	93-94	105-06	134		105-06
132.	Majeski, David	58-59	59-60	61-68	58-59	59-60	61-68		75	66	76	68, 97	77-78		
133.	Malone, Dorothy M.	67	66	66-67	51					51, 87	67-68, 91	101	99	81	101
134.	Mangum, Luther	77-78	97-100	97-100	81, 84, 87, 145	100, 145	100	197-200	68, 84	148-50	105, 113, 121-23	156-57, 159	167-69	128-33	156, 159

SA-74

135.	Maxwell, Karoline	133-34	142-43	136-37	133-34, 144-46	142-43	136-37	144-46	132, 147-49	81-82, 87	92-103	76-77, 80-81		150	77-79
136.	McCraney, Tracy	62		112	62			121	63	63	62, 130	61, 119	61, 149	61, 119	170-71
137.	McDaniel, Chantel	40-48	52-55	51, 56	40-48		51, 56		44, 56	82	34	39-40	86	56	
138.	McElroy, Tanuny J		76	81-83	50-61			127	47	65-67	44-45, 87-88, 106		120-21, 128-29, 141	91-92, 126-27	146
139.	McFarland Donald	120, 133-34	161-65	198-202	137-38	161-65	198-202	159-60	121, 124		141-44, 151-53	167-80, 185-86, 193-95	209-11	154-57	
140.	McGinnis, John	30-35, 71-72		43-44, 145	59-65	204-07	46-48	22-23, 75	31-32, 50-51	173	39, 75-76, 95-96, 104, 143	67-68, 145, 147-48, 163, 165-67, 171, 173, 178	180-81, 203-04	156, 160	150-51, 167, 190
141.	McGowan, Martha[2]	228-29	145-46, 230-31	145-46	229	144-45	144-45	233	229		185-87, 195	196-97		230	
142.	McKenzie, Yolanda				26-27, 34-35, 37-41	43	96	81-82	26-27, 34-35, 37-41	93-94	60, 64, 65-66, 70		97-98	94-95	
143.	Meyers, Angela	33-34, 68-69		93-94, 101-02, 128, 195-98,	53		93-94, 103	56-57	68-70, 206-07	43, 72, 77-78, 117-19, 180-81, 208-12	44-46, 81-82, 86-87, 128	73-75, 84, 100-01, 173-74, 188-89	105, 107-08, 116-17	57, 59, 72, 79-80, 182, 207-08	113, 127, 130-31
144.	Miller, Carmel E.	71-72		80				75-76	67-68	57, 104, 136	44-45, 65-66	55-56, 60-61, 63-64, 116-20		93-96, 81	
145.	Miller, John				41-45	46			43	47-48	48-51	52		58-59	
146.	Mize, Richard Preston	41-53	66, 141-42		41-53, 142			53-56	104-06	56-58, 91	62	62, 96	78-79, 98, 116	81-84	
147.	Moody, Dorris				58-59, 68-69	71-72	76, 77	54-56, 60		83, 106	100-04	151		83-85	42

[2] She was Store Manager for only one week

148	Morgan, Janice R	136-38	139-40	139-41					129-30	127-28	122	202-03	88-91	113	
149	Morris, Charles	76-77	42-44	44				40-41	27	29	47	61	56	33	61
150	Muse, Kenneth	35		89-90		90		86	34-35, 83	40, 86-87	77-78	99	101-04	81-83	109-10
151	Myers, David	23-29		43		44-46	43		25-26	37-41	68-69	58-59, 68, 81-83	73-75, 92	47-48	
152	Nash, Ethel L.	54	54		60, 63		54-55		66-67	52	75	48		76-77	
153	Nelson, Carla	49-55	62-65	56		62-65, 80-81	78		53	59-60	65-70	56			
154	Nevins, Lois	42-44	83	82		83	82	50-51	37-38	46	66-67, 62-63, 56-57	69	83-84	49	69
155	Newberne, Willie	27-31	27-31		91, 184-85	188		106	89-90	97		19			18-19
156	Notter, Diane K				40	70	56-58, 148	68	40	21, 27, 48, 25	58		88-90	52	
157	Obasuyi, Winston E.	158		69	158		69	163	155-58	65, 96-97, 104, 166	111-12, 168	90-91, 139-40, 142, 144, 220	97-98, 107, 109-10	32, 36, 41, 167-68, 224-25, 227	61
158	Odufuma, Henry O.	60-67	58	58-59, 85	60-67, 81-82	68	57		60	72	72	73-77	50-51	53-54	
159	O'Neal, Paul	60-61	60-61	66	60-61	60-61	66-67	62-63	61	58, 71	80	56-58	21-23	63-64	
160	Orona, Irenio	52-53	53-55	55	53, 91-92	53-54, 91-92	55		48	33			62-63	57	
161	Palladino, Paul	48-54, 65		62-63		64		46	55-60	79, 84	68-72	60-61		88	
162	Palmer, Roland	69	83	64					69	94	83-84	98	95	75	99
163	Papp, Michael			63-65	35-38	69, 75-76				114, 153-54	97-100, 114-15	111-12, 130, 140, 153-56	164-65, 177	65-66	173-74
164	Parker, Barbara A.		53-55	54-55, 82-83,	61-65, 130	53-55		146	51-52	31-32, 136-38	66-67, 139-40	132, 134	153-57	138-39	

SA-76

				146-47											
165.	Paul, Steven	81-85		80	81-85		80		82		60-64	76, 79, 116	106-07	100	116
166.	Pellegrin, Greg	43-45	45	46-47	43-45	46-47		64	43, 49	48-51	32-34, 52, 75	35-36, 40-42	52, 60	53	
167.	Pendleton, Gary	60-64, 70	71-72	84				56-57	62	81	73-74			78	
168.	Perry-Preddie, Veronica	17-18	33	24, 34	17-18	32	26	32	19	21	22, 27	26-27, 35, 37-38	53-56, 61-62	15-16	29-30
169.	Pettaway, Gail	73-74			74	129-31	115	117-18	75	169-72, 145	157	173	184-87	110-11, 194	173
170.	Pippin, Shelia	57-62, 107	40, 107	49-50	57-62	40	40	41-42	43-44, 60	45-47, 52	70-76	56-57, 135	94-95	63-66	96-97
171.	Plair, Aqueda	45, 72-76	77-78	76, 79	72-76	76-78	76, 79	41	72	87, 89	92	82, 92-95	88	80	94
172.	Potter, Cid			121-24	109-10	127-28, 129-30		102	106-07	98, 107, 114-15	94	131-32, 190-91	153-56	74, 87-89, 117-18	131
173.	Powell, James G.	97-99				119-20	121	182-83	95	67-68	109-12	122	128-34	77	122-23
174.	Radosh, Lana	125		105-06	125		105-06	108-09	110	34-35, 70	110	80, 90-96	56-61	111	
175.	Raine, Robin	93 94		111	93-97			113-14	95-96	103-04	104-05	115-16	130-53	91-92	
176.	Ralph, Jeffrey	79, 130-31	142-43, 145	141-42	130-38	142-47	141-43, 147	147-50	133, 152-55	79, 81-82, 160-62	90-94	166-68	170-74	155-57	162-66
177.	Ramos-Correa, Efrain	64		89-90		44-45, 47-50, 53-54			92	75	65-66			111	
178.	Reed, Trent	39-47	61	59-60	52-54	61-62	91-92	52-54, 58-59	40-42	54-56	62-64	64-65		56	64-65
179.	Reevers, E. Lawrence		114-15	112-14	44, 91, 99	114-15		107-08	94	122-23	58-59	126	163-65	105-06, 116-17	
180.	Reyes, Carlos				80-81	107	83-85	115	79	116	123-24	122	137-39	121-22	163

SA-77

181.	Rhein, Eric	49	49	62-63	52-55	57-63			50	57	48	70-75	47	66-68	
182.	Richardson, Barbara J.	52-57	76		57-58	49-51, 61-63		39-41	73	43-44, 46, 118	80-84	127	29-30	104-05	
183.	Robbins, Marcus	28-29		45, 115	18-26	42	41-42	40	18-19, 28-29	81	16-17, 32-34	70, 89-90, 87-89, 93, 136-37	135-36	60-61	89-90
184.	Robinson, David	65	114-15	114-20	69-71, 74, 79	118		136-39	63, 69	121-23, 176	140-42	103-04, 164, 171-72	164-70	123-30	103-04, 171-72
185.	Robinson, Desiree	100-03, 109		110-11, 114	79-84	94-100	94-100, 110-11		64-76, 105-06	136-39	127-28		142-44	123-27	129, 131
186.	Rodgers, Michelle		124-26	133-35	105-07, 110-12		136	123	93-94, 110-12	58-60	115, 122-23	50, 128-29	145-47	90-92, 124	57
187.	Rodriquez, Fred	78-83	73	74-75	78-83, 99 100	70-73			78	103	90-91, 104-06	100-03	54-55	98	
188.	Rodriquez, Mary L.	62	57-60	54-56		57-60	54-56	60-61	62	63, 65, 68, 69	81-82, 89	34-35, 37, 48-49, 51, 65, 76, 82	63-64	52	69
189.	Rogers, Elizabeth	59	59		60	69-70, 72		110	60-61	58, 140-42	143-44, 146		96-97, 106-07	109	
190.	Rose, Vada	42	59	55	42-44	60-61	55	47-49	43	77-78	61	77-78	71-72	51	56
191.	Rosenbeck, Robert		89		83			90-91	80	95-96	94		112-13		99
192.	Ross, Robert	77		126		127-28		124	194	101	134	173	163-64	116	173-74
193.	Sackman, Brenda	51, 91-92	58-61, 83, 91, 93	58					49-50, 51	52-53	33-35, 44, 69	79-82	83-84	55-56	
194.	Salazar, Beatriz	39-40, 47-48	33-34, 61	73-74	39-40, 41	33-34		52-60	38, 41	66, 68	74-76	106-08, 119-20	96-98	68-72	106-08
195.	Sander, James E.	31-34	102-07	101-02	31-34, 44-45, 75-78, 100	101-07	101-07	109	33, 77	83, 86-87	115-16, 141	94-95, 97-98, 140, 156-57	158	149-50	93-95, 97, 159

SA-78

196.	Schmelzle, Anne	72-73	90	88-89	75-76	91			65-66	78	95	107	98	82-84	108-09
197.	Schofield, Thomas	120, 127	154-55, 181-82	157		183-84	159-64	176	122-23	131, 135	165-69	140, 144, 155-156, 187	205-06	173	
198.	Scrivner, Vickey Jo				47		63-64	57-58		49, 104-05			98-99	54	
199.	Shrader, Ansel B.				78-79	80-88	92-93, 105		74	109-10	64	103	100-01	120-24	
200.	Sisler, Rodney	56-60	44-49	44				62	56-57	70-71	116	90-91	71-74		
201.	Smallwood, Betsy	47-48, 36-37, 120-24	157-66	85, 125-26, 200, 207		157-61, 165-66		73-75, 155	47-48, 123	115, 151-52	130-35, 146-48, 198, 209-10	87, 127-28, 129-30, 153, 166-69	172-76	125	128-29
202.	Smith, Cheryl	112		122-24	112	125-26		90; 117-18	110-11	86, 92	119-20	130	136-37	118	130-31
203.	Smith, Donnie		201	207-08	185-86	202-03	207-08		187	188-90	195-201	153, 136		193-94	
204.	Smith, Dorothy J.	23-27	31-32	52-54	27-29		52-54	28	23-27	55	41	49		32-33	
205.	Smith, Leona	174	159	151-53	174-84	164-65			177	127-29, 130-35	194-95	161, 195, 208-09, 213	216		195, 127-35
206.	Smith, Leroy	31, 42, 124	105-08, 128	54-55, 67-70, 135		105-08, 109-10, 128	67-70		105	32		29-30, 57	72	77-78, 103	
207.	Smith, Linda D.	78-79, 121-27		79-80	127	76-78, 82-83		130	121-27	88-89, 105	100-02	107	72-74	129	
208.	Smith, Vivian	65, 144			58	128	130			105	146-47, 150		165-66	116-17	
209.	Snowberger, Randy	32-34	32-34, 46	45	32-34, 35-36	47		44	30	38-39, 104	56	67-68, 92	74-75	40-44	
210.	Spellissy, Marie	42-47	73-79	83	42-56	75, 79	80-83	62-63, 70-72	56-57	57-58	83-86	86-87		58-59	113-16
211.	Spencer, Sophia J.	33			33					64		56	52	37-38	53-55

212.	Spruce, David			86-87	55, 62-65	88-89	86-87	91, 93	63-66	68-70, 70-71	84-85, 95-96	139		93	
213.	St. Hilaire, Theresa		71		81, 85-86	70, 79-80	68-69	74-77, 87-88	82-83	90-91	54-56	51	111-13	89-90	51
214.	Stanaway, Heather	157													95-96, 134-35
215.	Stewart, Saundra R.	39-40, 71, 73-74	91-92, 95-96	97-100		93-94		87-91	39-40, 141-42	42, 54-55, 57-58, 65, 69	74-81	101, 117, 144-45	121	81-83	100-01
216.	Stockdale, Valerie K.	119	133	134		137			114-15	197	122-25	200	171	202, 236	200
217.	Stoops, Scott	55	55	91					59	57	82	92	103-04	66	93
218.	Stover, Nancy (Thompson Kidd Tuflock)	100		108		110-12		103-04	95-96	102	104-06	112	115-16	93-94	112
219.	Stream-Hucyck, Shelly	159		57-59, 114				78	75, 88	88-89	107-10	81-83, 113-14, 128	85	159	
220.	Strickland, Mary C.	58, 60	61-62	61	60	61-62		77	60	71	70	115-16	88-92	67-65	78-79
221.	Stroud, Rita	68-69		71-73, 121		73-75, 85-88		68-70, 92-93	95-97	94, 109, 112, 152	118-21	104-05, 107-08	155	104-05	133-36, 138
222.	Summerlin, Janet		138-40	124-28, 134-35	117-24	138-42	124-37	168-69	121-22	197	73-77	103-07		158-61	
223.	Sylvester, Barbara	130-31	92	92	134-39	89-92	87-91	58-59	130-31	129, 139-40	119-20	72-73, 128-29		92-97	119-29
224.	Tanner, Geraldine	147-62, 165, 169-70	183-84		147-61, 165-66			195-96, 207-08	169	170-73	117-24			72, 185-91	117-24, 176
225.	Tetley, Regina L.				96, 110, 114				120						
226.	Thornton, Glenda A.										13			20	
227.	Trout, Laurie R.	109-11		98, 101-02	214-15			123	110-11	147	89		87, 148-49	122-23	

SA-80

228	True, Richard	30-31, 33	30-31	38-39	30-31, 33	30-31	38-39, 49, 58-60	19-20, 33-34, 45	27	35, 58	47, 51	40, 87	73-77	40-44	51
229	Turner, Angela D.	37, 69	69	51-52, 58, 69	45	69	53	72	45, 71	62-63, 71	47, 57, 72	72-74	72-73	73	
230	Turner, James E.	72-76	77-78, 95	69-72, 94-95	72-76	77-78	69-72	78-79	33	85	85-87	67-68, 72, 84	98-100	81	100-01
231	Vasquez, Debbie	65-72	65-72	125	65-72	65-72	124-25	94-95	81	109, 137	36-48, 78	116-19, 146	141-44	139	146
232	Velazquez, Zenaida	90	90	96	92-93		95-96		91	94, 102	105-06	97-99, 111	54, 81	103	
233	Vest, Terry A.	25-34, 37	65-66, 70	53, 71-73					35, 38-39			53, 90	102-03	90-93	
234	Vidales, Juan	79, 81	93-95	90-92	79-81	92-95	91-92	87-89	82, 86	67-72	95-99	100, 102-06, 109	110-11	72-74	99-101
235	Walker, Pamela E.	36-40			36-40				29, 32		46-47	52-53, 76-77	88-89		52-54, 70, 77
236	Walker, Priscilla K.	37-40	59-50	59-51	37-40			65-66	41	52, 99	53	69, 99, 117	74-75, 105-06	66	69
237	Warren, Charles M.				92, 94	96-101	101-02	106-08	92	118	61-62	141-43		123	
238	Washington, Roosevelt	96	119	119-20	91-92			102-03	81, 94	80, 92-98	109-11	121-22	130-33	82-83, 99	121
239	Watkins, Roxanne			99	88-89, 114-17	104		160	88, 115-16	81, 84-86, 157	129-32	151-52	174-76	159-60	165-66
240	Watson, Duane	36	8	83		87-88	83	51	43	57	8	78	94-95	59	78
241	West, John W. (Sr.)	65-66	91-92	87-88	65-66; 66-67; 142-43		87-88	86-87; 142-43	61-62	46-47; 53; 84-85	71-72	53-54	100-01, 109-14	82-83	
242	Whaley, Birdie J.	45-46, 53		59-60		54					64	62-63	98-101	82-83	
243	Whaley, Cindy	87-88				75-76	98-99	78-79	84	89	89-90	102-03	121-24	79-81	102-03
244	Wildberger, Richard	94			96-97	102	98-99	88	92-93	34-35, 51-52, 85	105-06	130	115-17	86	105

SA-81

245	Wilkins, Melvin	59-60, 107, 116		73-77		72		80-82	60, 117	71-72, 99, 103, 122	97-98, 123-24	98	100	78-79	108-10
246	Williams, Bonnie		124-25	118-20	44-50, 60-64			34-36, 145	41, 43, 49, 54, 77, 84, 150, 172	150-51, 154	91-94	109-10, 115-17, 156, 165-67	159-60	140-43	114-16, 167-68
247	Williams, Jackie				40-41	44-54	54-55	61	41, 72-73	61, 71-72	36-38	56, 65, 94	15-16	63-65	65
248	Williams, Mike	42	47	47-48	42, 44-46, 134-35	134-35		53-54, 133, 147	45-46		55-56	88	70-74, 151-52	53-55, 133-[illegible]2	
249	Wilson, Gloria	59-60		66, 75-76	45-53				53	61	66-70			65	
250	Woods, Alonzo	61-62	25-26, 61, 63-64, 66-67		52-57, 61	61	61	38	59-60	162-63	23, 157	20, 73-74, 115, 118-19, 201-03	97-98, 112, 207-08	128-29	217-18
251	Woods, Brenda C.	39-40		52		50-51			40	69, 71-72	26-27	71-72	58	59	
252	Worthington, Jerry	74-79	74-79	91-93	74-79	74-79	91-93	82	78, 90	67, 84, 119-20	60-61	64	67-68	85-87	94
253	Wright, James	51	97-98, 104, 118	94-95	48-51, 57-58	97-98, 104	95-96, 105, 111	146	142, 199	147	132-35	112, 158-59, 164, 198	172-73	137-38	113-14, 175
254	Zamarripa, Evangelina		138-43	167	51-54	141-43	96-97, 167, 181-82	155	82, 129	153-55	99, 106-08, 151-52, 158	143-46, 150, 154-55, 187		94-95, 117	103-04, 150, 175-76
255	Zimmerman, Sonja	137				139-42	137-38	122-23	126	133	34-40, 133-34	145-46	153	118-20	145

SA-82